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78

In The
Supreme Court of the United States

VICTOR SARAVIA-PAGUADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 511(a) of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), modified by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991), created a bar to relief from removal under former 8 U.S.C. § 1182(c) (repealed in 1996) for lawful permanent residents who have served a total of more than five years in prison *for* one or more aggravated felony convictions.

The question presented is whether the time a lawful permanent resident served in prison pursuant to a recidivist sentencing enhancement statute can be included in calculating the total time served *for* aggravated felony convictions, for purposes of determining whether he is subject to the bar to relief from deportation under former 8 U.S.C. § 1182(c), Immigration and Nationality Act § 212(c) (repealed in 1996), as enacted by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), and modified by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991).

PARTIES TO THE PROCEEDING

Petitioner (petitioner below) is Victor Saravia-Paguada. Respondent (respondent below) is Michael B. Mukasey, Attorney General of the United States.

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PETITION FOR A WRIT OF CERTIORARI

Victor Saravia-Paguada respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals in Petitioner's petition for review (App. 1-28) is reported at 488 F.3d 1122 (9th Cir. 2007) (case number 05-73098). The opinion of the Court of Appeals in Petitioner's prior petition for review (App. 29) is unpublished and unreported (case number 02-73509). The opinions of the Board of Immigration Appeals (App. 30, 34, 35-36) and the Immigration Judge (App. 31-33, 37-50) are unpublished. The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for rehearing and suggestion for rehearing *en banc* (App. 51) is unpublished (case number 05-73098).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 2007. Rehearing was denied on October 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Reprinted in the appendix to this petition (App. 52-64) are pertinent provisions of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990); the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991); Section 1101(a)(43) of Title 8, United States Code (2006); Section 1182(c) of Title 8, United States Code, as in effect before November 29, 1990; Section 1182(c) of Title 8, United States Code, as in effect between November 29, 1990 and December 12, 1991; Section 1182(c) of Title 8, United States Code, as amended effective December 12, 1991; and California Health & Safety Code § 11370.2 (1992).

STATEMENT

A. Introduction

Petitioner Victor Saravia-Paguada ("Petitioner") has been a lawful permanent resident of the United States for over 41 years, since he was one-and-a-half years old. He has twice been convicted and served time for aggravated felony controlled substance offenses. In 1988, Petitioner was sentenced to five years and eight months in prison, and was released after serving approximately two years and one month. In 1992, he was sentenced to two years and eight months in prison for controlled substance

offenses. He separately received an additional sentence of three years pursuant to a recidivist enhancement statute. Of the combined five year and eight month sentence he received in 1992, Petitioner served a total of approximately three years and three months in prison.

Petitioner was found deportable based on the aforementioned convictions, and applied for relief from removal under former 8 U.S.C. § 1182(c); Immigration and Nationality Act ("INA") § 212(c) (repealed in 1996) ("§ 212(c) relief"). Section 511(a) of the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990), created a bar to relief from deportation (now called "removal") under former 8 U.S.C. § 1182(c) for persons who have served more than five years in prison *for* aggravated felony convictions.[1] The court and agency decisions below all held that Petitioner is subject to that statutory bar, based on their determinations that it was

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[1] The Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) enacted a bar to § 212(c) relief for any "alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." IMMACT § 511(a). The following year, Congress passed the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733 (Dec. 12, 1991) ("Miscellaneous and Technical Amendments"), which amended IMMACT § 511(a) by changing the bar to § 212(c) language to "who has been convicted of one or more aggravated felonies and has served *for such felony or felonies* a term of imprisonment of at least 5 years." Miscellaneous and Technical Amendments § 306(a)(10) (emphasis added).

proper to include the time Petitioner served for both the substantive offenses *and* the recidivist enhancement in calculating whether he had served over five years in prison *for aggravated felony convictions*.

There is no disagreement among the parties that, if time served pursuant to the enhancement statute cannot be counted as time served "for" an aggravated felony conviction, Petitioner would be statutorily eligible for § 212(c) relief. Moreover, under Board of Immigration Appeals precedent, given Petitioner's strong equities (he has been a lawful permanent resident for almost 42 years, since the age of one-and-a-half, and his daughter, mother, and four siblings are all United States citizens or lawful permanent residents) and his rehabilitation (no conviction since 1992), there is every likelihood that he would be granted such relief and allowed to remain in this country – the only home he has known – with his family and community. *See, e.g.*, *Matter of Edwards*, 20 I. & N. Dec. 191 (BIA 1990); *Matter of Marin*, 16 I. & N. Dec. 581 (BIA 1978).

On May 21, 2007, the Ninth Circuit Court of Appeals issued a published decision finding that Petitioner was statutorily ineligible for relief under former 8 U.S.C. § 1182(c) because he allegedly served over five years in prison for aggravated felony convictions. *See* App. 1-28. However, this holding was erroneous because the time that Petitioner served in prison pursuant to a recidivist sentencing enhancement statute should not have been included in calculating the total time he has served for his aggravated

felony convictions. This Court has recently granted certiorari to consider a similar sentencing enhancement issue in the criminal context, *see United States v. Rodriquez*, Case Number 06-1646, and should do so in the instant case as well.

The Ninth Circuit's holding that, for purposes of the IMMACT bar, time served pursuant to a recidivist enhancement statute should be included in calculating total time served *for* aggravated felony convictions cannot be reconciled with the plain language of the statute.[2] Under the plain language of § 212(c), the time Petitioner spent in prison pursuant to the recidivist enhancement statute should *not* have been considered in determining the amount of time he served "for" "one or more aggravated felonies" for purposes of determining whether the IMMACT bar renders him ineligible for § 212(c) relief.

As this Court has already found that this important and far-reaching issue warrants review in the

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[2] The Ninth Circuit's decision also conflicts with its prior decisions in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*), *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004), *United States v. Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), and *United States v. Moreno-Hernandez*, 419 F.3d 906 (9th Cir. 2005). All of those cases make clear that, because recidivist enhancement statutes are not substantive offenses, sentences pursuant to those enhancement statutes cannot be considered in determining the possible sentence or the amount of time served for the underlying substantive offense – in this case for the aggravated felonies.

criminal context, and as Petitioner's case raises substantively the same issue in the immigration context,[3] this Court should grant Petitioner's petition for writ of certiorari and reverse the Ninth Circuit's decision.

B. Statutory Background

1. Pre-IMMACT Law

Prior to the 1990 enactment of IMMACT, lawful permanent residents who were deportable due to most criminal convictions, including controlled substances offenses, could apply for discretionary relief from deportation if they had seven consecutive years of residency in the United States.[4] 8 U.S.C. § 1182(c) (1989).

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[3] This Court has previously recognized that the issue of § 212(c) eligibility has an immensely far-reaching effect: "[T]he class of aliens whose continued residence in this country has depended on their eligibility for § 212(c) relief is extremely large, and not surprisingly, a substantial percentage of their applications for § 212(c) relief have been granted. Consequently, in the period between 1989 and 1995 alone, § 212(c) relief was granted to over 10,000 aliens." *INS v. St. Cyr*, 533 U.S. 289, 295 (2001).

[4] Although the statutory language only explicitly extended eligibility for § 212(c) relief to lawful permanent residents who traveled abroad and were seeking readmission, it is well-established by agency interpretation that this relief was also available to lawful permanent residents in deportation proceedings who had not left the country. *See Matter of Silva*, 16 I. & N. Dec. 26 (BIA 1976); *see also Francis v. INS*, 532 F.2d 268, 273 (2nd Cir. 1976); *Tapia-Acuna v. INS*, 640 F.2d 223, 225 (9th Cir. 1981).

2. IMMACT

In 1990, Congress enacted IMMACT which, *inter alia*, amended INA § 212(c) to create a bar to relief for any "alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years." IMMACT § 511(a).

3. Miscellaneous and Technical Amendments

Congress subsequently amended the IMMACT aggravated felony bar in the Miscellaneous and Technical Amendments by changing the bar to § 212(c) language to make two things clear. First, that the time served for "one or more aggravated felonies" could be aggregated and would apply if the total time served was at least five years. Second, that, for the bar to apply, the time served had to be *for* aggravated felony convictions, and not for some other non-aggravated felony offenses. Congress accomplished this by changing the language from "who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years" (IMMACT) to "who has been convicted of one or more aggravated felonies and has served *for such felony or felonies* a term of imprisonment of at least 5 years." Miscellaneous and Technical Amendments § 306(a)(10) (emphasis added). This revised language was made effective "as if included in the enactment of the Immigration Act of 1990." *Id.* at § 310.

C. Statement of Facts

Petitioner Victor Saravia-Paguada is a 43-year-old citizen and national of Honduras. A.R. at 330, 337.[5] He entered the United States as a lawful permanent resident on April 26, 1966, when he was one-and-a-half years old, and has only returned to Honduras for a visit of approximately one week since that time. *Id.* at 43-44, 276. Petitioner has spent essentially his entire life in the United States, and his mother, daughter, and four siblings all reside in the United States and are all United States citizens or lawful permanent residents. *Id.* at 127, 141, 175.

When he was in his twenties, Petitioner became involved with drugs and ran afoul of the law. On October 19, 1988, he was convicted of conspiracy (California Penal Code § 182.1), possession for sale of cocaine (California Health & Safety Code § 11351), possession for sale of methamphetamine (California Health & Safety Code § 11378), and possession of a throwing star (California Penal Code § 12020(c)). *Id.* at 267. He received a sentence of five years and eight months for these offenses, and he served approximately two years and one month in state prison before being released. *Id.* at 245-47, 267.

On June 30, 1992, Petitioner was convicted of possession of methamphetamine (California Health &

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[5] A.R. refers to the Certified Administrative Record that was submitted to the Ninth Circuit in *Saravia-Paguada v. Gonzales*, Case Number 05-73098.

Safety Code § 11378) and cultivation of marijuana (California Health & Safety Code § 11358). *Id.* at 249. The state court also convicted him under a recidivism statute (California Health & Safety Code § 11370.2), which imposed a separate three-year sentence enhancement for having previously been convicted of a drug-related crime. *See id.*; App. 63-64. Petitioner was sentenced to a total of five years and eight months for the two substantive offenses and three years for the sentence enhancement pursuant to California Health & Safety Code § 11370.2. A.R. at 249. He was released after serving approximately three years and three months in state prison. A.R. at 244-45, 249.

D. Procedural History

On May 2, 1990, the legacy Immigration and Naturalization Service ("INS")[6] issued an Order to Show Cause in Petitioner's case, charging him with being deportable for a violation of former 8 U.S.C. § 1251(a)(11) (1990), for having been convicted of a controlled substance violation. A.R. at 276. On August 20, 1991, Petitioner filed a Form I-191, Application for Advance Permission to Return to Unrelinquished Domicile under former INA § 212(c) with the Immigration Court. A.R. at 330-31.

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[6] The INS has been abolished and replaced by the Department of Homeland Security, pursuant to the "Homeland Security Act of 2002," Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002).

On February 23, 1996, the immigration judge issued a decision ordering Petitioner deported, and finding that, pursuant to IMMACT § 511(a), Petitioner was ineligible to apply for § 212(c) relief because he had served over five years in prison for aggravated felony convictions. App. 37-50. On March 24, 1997, the Board of Immigration Appeals ("BIA") dismissed Petitioner's appeal, but stated that he could file a motion to reopen based on the Attorney General's decision in *Matter of Soriano*, 21 I. & N. Dec. 516 (1997). App. 35-36. The BIA granted Petitioner's motion to reopen on July 15, 1997 and remanded his case back to the immigration judge. App. 34. On May 30, 2002, the immigration judge issued a decision finding that *Matter of Soriano* did not apply to Petitioner's case, that Petitioner was still deportable and ineligible for § 212(c) relief from deportation, and ordering Petitioner deported and requesting that his decision be certified back to the BIA. App. 31-33. On September 25, 2002, the BIA issued an affirmance without opinion of the immigration judge's decision. App. 30.

On October 24, 2002, Petitioner filed a petition for review of the BIA's decision with the United States Court of Appeals for the Ninth Circuit (case number 02-73509). On June 24, 2004, the court dismissed his case for lack of jurisdiction, pursuant to section 309(c)(4)(G) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996). App. 29.

On September 17, 2004, Petitioner filed a petition for writ of habeas corpus with the United States District Court for the Northern District of California (case number C 04-3940 (JSW)). On May 11, 2005, Congress enacted the "Real ID Act of 2005" ("Real ID"), Pub. L. No. 109-13, 119 Stat. 231 (May 11, 2005), which amended the judicial review provisions of the Immigration and Nationality Act to require that review of final orders of removal be brought in the courts of appeals. *See* Real ID § 106(a)(1)(B), enacting 8 U.S.C. § 1252(a)(5) (a petition for review is the "sole and exclusive means for judicial review of an order of removal"). Real ID also provided that all petitions for writ of habeas corpus that were pending in district courts on the date of Real ID's enactment must be transferred to the court of appeals and treated as petitions for review. *See id.* at § 106(c). In addition, Real ID eliminated the jurisdictional limitations to reviewing applications for relief for aliens deportable for criminal convictions. *See id.* at § 106(a)(1)(A), enacting 8 U.S.C. § 1252(a)(2)(D) (constitutional and legal claims are reviewed in the court of appeals on a petition for review, notwithstanding the jurisdictional limitations of 8 U.S.C. § 1252(a)(2)(C)).[7]

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[7] Real ID also eliminated IIRIRA's transitional rules for judicial review and treats petitions for review of deportation cases as if they had been filed under 8 U.S.C. § 1252, as amended by IIRIRA. *See* Real ID § 106(d). Thus, IIRIRA § 309(c) is no longer applicable to Petitioner's case.

On May 17, 2005, Petitioner and Respondent filed a stipulation in the district court transferring the habeas case to the Ninth Circuit pursuant to Real ID § 106(c) (stating that cases brought under 28 U.S.C. § 2241 that are pending on the date of the enactment of Real ID shall be transferred to the court of appeals and the court shall treat the transferred case as a petition for review). On May 24, 2005, the district court transferred the case to the United States Court of Appeals for the Ninth Circuit. On May 25, 2005, pursuant to Real ID and the district court order, the Ninth Circuit converted Petitioner's case into a petition for review. On January 26, 2006, the court granted Petitioner's motion for stay of deportation. On May 21, 2007, the court denied Petitioner's petition for review. App. 1-28.

On August 20, 2007, Petitioner filed a petition for panel rehearing with request for rehearing *en banc*. On October 4, 2007, the court denied Petitioner's petition for rehearing. App. 51. On October 17, 2007, the court granted Petitioner's motion to stay the mandate.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Decision Ignores the Plain Language of the Statute by Including the Time Petitioner Served for a Non-Aggravated Felony Conviction in Determining Whether He Is Subject to the IMMACT Bar

The Court of Appeals' decision misreads the plain language of section 511(a) of IMMACT and section 306(a)(10) of the Miscellaneous and Technical Immigration and Naturalization Amendments, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (effective Dec. 12, 1991), which amended the IMMACT bar. In its decision, the panel held that, "[b]ecause the terms of the statute require a court only to determine the ultimate amount of time served, it is immaterial whether a sentencing enhancement may have increased the base term." App. 12. This finding was clearly erroneous as it is contrary to the clear words of the statute.

The plain language of former section 212(c), as amended by IMMACT, bars relief for an alien who: (1) "has been convicted of one or more aggravated felonies"; *and* (2) "has served *for such felony or felonies* a term of imprisonment of at least five years." 8 U.S.C. § 1182(c) (1993) (emphasis added). Contrary to the court's ruling, there is a material difference between the sentence for the substantive offense and any increase in the overall sentence due to a recidivist enhancement (*see* § 2, *infra*). The statute on its face unequivocally states that *only time served for*

aggravated felony convictions may be considered in determining whether the IMMACT bar applies.

The Ninth Circuit's decision clearly shows that it ignored the language "for such felony or felonies" and changed the focus and analysis to whether Petitioner's extra three year sentence for being a recidivist was "on account of" or "as a result of" his aggravated felony conviction. App. 11 ("The focus here is on calculating the *amount* of time served *on account of* the felony convictions") (emphasis in original). But courts must presume that Congress chose words for a reason and must give effect to the choice of different words in different parts of statutes. *See, e.g., United States v. Ramirez-Sanchez,* 338 F.3d 977, 979 (9th Cir. 2002) ("[S]tatutory language should not be read in such a way as to render words or phrases as mere surplusage."); *Boise Cascade Corp. v. EPA,* 942 F.2d 1427, 1432 (9th Cir. 1991) (courts must interpret statutes "as a whole . . . [and give] effect to each word. . . .").

Here, the Court of Appeals essentially changed the language of the statute and applied a cause and effect analysis, reasoning that but for the fact that petitioner was convicted of the aggravated offense he would not have received the enhanced sentence for being a recidivist. But that is an improper inquiry. Congress changed the IMMACT language to require that the time served be "for such [aggravated] felony or felonies" and the Court must give effect to Congress' choice of words. Miscellaneous and Technical Amendments § 306(a)(10). It was error for the lower

court to ignore that choice of Congress and to substitute its own judgment that as long as Petitioner was convicted of an aggravated felony, any sentence he received for any other reason or offense could be counted as a sentence "for" that aggravated felony. Such a position runs smack afoul of this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 488 (2000), in which this Court explicitly and clearly held that "recidivism does not relate to the commission of the offense."

The Ninth Circuit also erred in relying on a footnote in *Tbia v. Fasano*, 334 F.3d 917, 919 n.1 (9th Cir. 2003), to hold that the *only* substantive amendment to the IMMACT bar made by the 1991 Miscellaneous and Technical Amendments was to clarify that the bar could be applied in the aggregate to multiple aggravated felony convictions, as well as to just one. App. 13-15. Clearly, in adding the qualifying term "and has served *for such felony or felonies* a term of imprisonment of at least 5 years," Congress also clarified that only time served "*for*" aggravated felony convictions triggers the bar. Miscellaneous and Technical Amendments § 306(a)(10) (emphasis added). *See also Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."). The fact that the court of appeals – in a different case and addressing a different point – only remarked on one of those changes does nothing to negate the fact that Congress

clearly made *both* those changes in enacting the amendment. Distinguishing what the sentence was for the aggravated felony conviction from what the sentence was for the recidivist enhancement (or in another case, what it might be for any other non-aggravated felony offense) was essential to implement Congress' intent.[8]

Lastly, even had the Ninth Circuit felt any uncertainty regarding Congress' intent as to which sentences trigger the IMMACT bar, the court erred in failing to follow "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. St. Cyr*, 533 U.S. 289, 319 (2001), *quoting INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

Thus, because Petitioner has served less than five years in prison *for* aggravated felony convictions, he is not subject to the IMMACT bar and remains statutorily eligible to apply for § 212(c) relief. The Ninth Circuit's decision should, therefore, be reversed.

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[8] The court also erred in finding that it would be "unworkable" to require immigration judges to prorate the amount of time served for aggravated felonies, as it would force them to "contrive proportionate values for each aggravating factor, then deduct those artificial values from the imposed sentence." App. 13. In fact, however, the calculation would be very workable as Petitioner's record of conviction clearly distinguishes between the sentence he received for each of his aggravated felony offenses and the sentence he received for the recidivist enhancement. *See* A.R. at 249.

2. The Court of Appeals' Decision Misapplied the Law and Is in Conflict with its Own Clear Precedent that Recidivist Sentencing Enhancements Cannot Be Considered in Determining the Sentence for Substantive Offenses

a. The court failed to properly apply its precedent decisions in *Corona-Sanchez*, *Rusz*, and *Rodriquez* to distinguish between time served *for* aggravated felony convictions and time served pursuant to a recidivist sentencing enhancement statute

The Ninth Circuit's decision in the instant case also sharply conflicts with the well-established law of that Circuit, that time served pursuant to a recidivist sentencing enhancement statute does not constitute time served *for* an aggravated felony conviction because a recidivist enhancement statute does not describe a substantive offense. In its decision, the court distinguished Petitioner's case from its precedent decisions in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (*en banc*), *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004), and *United States v. Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), erroneously finding that the aforementioned cases concerned the *nature* of the offense, whereas Petitioner's case concerned solely the *amount of time* served for the offense, regardless of its nature. App.10-11. However, Petitioner makes substantially the same argument as the Ninth Circuit previously accepted in those precedent cases – that a three-year sentence enhancement for recidivism under California Health

& Safety Code § 11370.2 does not constitute a sentence "for" an aggravated felony because § 11370.2 does not describe an aggravated felony offense. In Petitioner's case, as in *Corona-Sanchez*, *Rusz*, and *Rodriquez*, it was the *length of the sentence* for the qualifying conviction that determined whether adverse consequences attached to that conviction, and not the *nature* of the offense.

In *Corona-Sanchez*, the Ninth Circuit engaged in exactly the same threshold inquiry as it should have again done in Petitioner's case to determine whether the statutes under which the alien was sentenced describe aggravated felonies, such that an increased federal sentence should be imposed. 291 F.3d at 1203. In that case, the court held that in calculating the sentence for an aggravated felony, courts must *only* "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Id.* at 1209. The issue before the court in *Corona-Sanchez* was whether a prior petty theft conviction constituted an aggravated felony under 8 U.S.C. § 1101(a)(43)(G), such that an increase in the petitioner's sentence for a subsequent unlawful reentry conviction, pursuant to 8 U.S.C. § 1326(b)(2), would be justified. *Id.* at 1202. The petitioner in *Corona-Sanchez* had been convicted under California Penal Code § 484(a) of petty theft, which carried a six month maximum sentence, and under California Penal Code § 666, which added a two year sentence enhancement for recidivism. *Id.* The petitioner was subsequently convicted of unlawful reentry into the

United States and the District Court determined that his prior 1994 petty theft conviction was an aggravated felony under 8 U.S.C. § 1101(a)(43)(G) because the petty theft sentence combined with the enhancement sentence rendered his conviction a theft offense "for which the term of imprisonment [is] at least one year." *Id.* at 1208.

In holding that the district court had erred in finding that the prior conviction was for an aggravated felony, the Ninth Circuit in *Corona-Sanchez* made clear that a distinction must be drawn "between substantive offenses and recidivist sentencing enhancement statutes" for purposes of calculating actual time served for that substantive offense. *Id.* at 1209, *citing Apprendi v. New Jersey,* 530 U.S. at 488 (2000) ("[R]ecidivism does not relate to the commission of the offense"). The court further noted that "[e]xamining the crime itself, rather than any sentencing enhancements, is also consistent with the legislative history of defining aggravated felonies under 8 U.S.C. § 1101(a)(43)." *Id.*; *see also Rusz*, 376 F.3d at 1185 (noting that "the *Corona-Sanchez* defendant's actual two-year sentence was of no moment" for purposes of the analysis). The court thus held that *because the petty theft statute carried a maximum penalty of only six months, the offense was not an aggravated felony* regardless of any additional amount of time the defendant served pursuant to the sentencing enhancement. *Id.* at 1213. As in Petitioner's case, this was clearly an inquiry into the *length of the sentence* for the substantive offense, and

not an inquiry into the *nature* of the conviction, contrary to the court's finding. The court in *Corona-Sanchez* thus concluded that, for purposes of determining the sentence imposed for an aggravated felony conviction,[9] courts must not look at the sentence imposed for recidivist statutes and must *only* consider the sentence imposed for the substantive offense. *Id.* at 1210-11.

Subsequently, in *Rusz v. Ashcroft*, in the immigration context, the Ninth Circuit applied the same reasoning as it had in *Corona-Sanchez*, holding that a sentence enhancement must be separated from the underlying crime when determining the *term of commitment for a criminal conviction* because sentence enhancements "do not describe substantive criminal offenses." 376 F.3d at 1185. In concluding that the court was not barred from asserting jurisdiction over the alien's petition for review under 8 U.S.C. § 1252(a)(2)(C),[10] the Ninth Circuit conducted the same inquiry as it had in *Corona-Sanchez*, to determine

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[9] The Ninth Circuit has established that "the definition of 'aggravated felony' under section 1101(a)(43)(B) applies to both the Immigration and Nationality Act and the Sentencing Guidelines that adopted the INA's definition of that term." *United States v. Figueroa-Ocampa*, 494 F.3d 1211, 1216 (9th Cir. 2007).

[10] 8 U.S.C. § 1252(a)(2)(C) bars jurisdiction over removal orders of, *inter alia*, aliens who were found to be removable under 8 U.S.C. § 1227(a)(2)(A)(i) (for aliens who were convicted of a crime of moral turpitude that was committed within five years after the date of admission *and* who were convicted of a crime for which *a sentence of one year or longer may be imposed*).

whether the alien's conviction for petty theft with a prior burglary conviction barred jurisdiction as "a crime for which a sentence of one year or longer may be imposed." *Id.* at 1184-85. The petitioner in *Rusz* had been convicted of second degree burglary, and was subsequently convicted of petty theft (which carried a maximum sentence of six months) with a sentence enhancement due to the burglary conviction (which added a one year sentence to the underlying term). *Id.* at 1183. Based on these convictions, the petitioner was charged as removable under, *inter alia*, 8 U.S.C. § 1227(a)(2)(A)(i), as an alien who has been convicted of a crime of moral turpitude for which a sentence of one year or longer may be imposed. *Id.* at 1183-84.

In holding that the petitioner's conviction for petty theft with a prior did *not* carry a sentence of one year or more, despite the one year and six month sentence that the aggregate of the substantive and recidivist statutes imposed, the Ninth Circuit made clear in *Rusz* that recidivist enhancements must be separated from substantive criminal offenses for purposes of determining the sentence imposed *for a substantive criminal offense*. *Id.* at 1185. The court reasoned that this was necessary because enhancement statutes are found in entirely separate sections of the state criminal code and assign prison terms to behavior that is distinct from the underlying crime. *Id.* The court held that the only sentence that could be considered in determining the possible sentence Rusz faced was his sentence for the underlying petty

theft offense, which carried a maximum sentence of six months, and not any additional sentence under the recidivism enhancement statute. *Id.* at 1185. The court thus concluded that commitment time for the crime at issue should be calculated based on the sentencing scheme for the underlying crime, not on any enhancements that increase the prison term due to prior or other behavior. *Id.*; *see also Rodriquez*, discussed in § 3, *supra*. Importantly, in both *Rusz* and *Corona-Sanchez*, as in Petitioner's case, the Ninth Circuit's ultimate determination rested on the *length of the sentence*, and not the *nature* of the underlying conviction.

Exactly the same reasoning as the Ninth Circuit applied in *Corona-Sanchez*, *supra*, and in *Rusz*, *supra*, should have been applied in Petitioner's case. In 1992, Petitioner was convicted of two substantive offenses: possession of methamphetamine, in violation of California Health & Safety Code § 11378, and cultivation of marijuana, in violation of California Health & Safety Code § 11358. Each of these crimes carried a sentencing range of sixteen months, two years, or three years, and Petitioner received the mid-range sentence of two years for the Section 11378 violation and a consecutive sentence of eight months for the Section 11358 violation. A.R. at 249, 251. In addition to these convictions, Petitioner was also sentenced under California Health & Safety Code § 11370.2, which imposes an additional three-year sentence for having previously been convicted of an

enumerated drug-related crime. The statute provides, in relevant part:

> Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 . . . shall receive, in addition to any other punishment authorized by law, . . . a full, separate, and consecutive three-year term for each *prior* felony conviction of, or for each *prior* felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.

App. 64; California Health & Safety Code § 11370.2 (1992) (emphasis added). This enhancement statute is directly analogous to the enhancement statute that was at issue in both *Corona-Sanchez*, *supra*, and *Rusz*, *supra*, California Penal Code § 666, which provided for a sentence enhancement for prior theft offenses. A sentence enhancement under a different statutory provision, and based solely on a *prior* violation, is *not* a sentence for an aggravated felony conviction. Rather, it is the underlying offense that is the aggravated felony and for which Petitioner served a separate prison term. Thus, in accordance with the Ninth Circuit's well-established case law on this issue, the calculation of Petitioner's time served for aggravated felonies should not have included time served pursuant to the three-year sentencing enhancement statute under which Petitioner was sentenced.

Moreover, in *Corona-Sanchez* and *Rusz*, as well as in *Rodriquez* (*see* § 3, *infra*) and in Petitioner's case, the determinative factor in deciding whether additional consequences should attach to the underlying conviction was the *length* of the sentence *only for that substantive offense*, with the Ninth Circuit consistently finding that a recidivist enhancement statute does not alter the actual sentence *for* that underlying substantive offense. At no time did the court consider any elements of the crime or the "nature" of the crime itself. In *Corona-Sanchez*, *Rusz*, and *Rodriquez*, the relevant inquiry concerned the *length of sentence* that could be *imposed for* the qualifying conviction, which determined whether adverse consequences attached to that conviction. Likewise, in Petitioner's case, the relevant inquiry should only have been the *length of sentence* imposed (and consequent time served) *for* the aggravated felony conviction, not the additional three-year sentence imposed under the separate recidivism statute.

b. The Court of Appeals' decision failed to properly distinguish between substantive, conduct-based sentencing enhancements and status-based sentencing enhancements, such as enhancements for recidivism.

For purposes of determining whether increased sentences (or possible sentences) are considered part of the sentence for the underlying offense, as opposed to a separate sentence (for past conduct, for example), there is a sharp distinction between status-based

recidivist enhancements (such as those at issue in *Corona-Sanchez* and its progeny, as well as in Petitioner's case), and enhancements based on the conduct involved in the commission of the offense itself. The court's decision in Petitioner's case fails to recognize that distinction.

The Ninth Circuit itself recognized this precise distinction in a prior decision, yet failed to apply that same reasoning in the instant case. *See United States v. Moreno-Hernandez*, 419 F.3d 906 (9th Cir. 2005). In *Moreno-Hernandez*, the Ninth Circuit engaged in a thorough and detailed analysis of which sentencing enhancements could be considered in determining the maximum possible sentence for an offense for purposes of determining whether a defendant's conviction constituted a crime of violence (which requires a sentence of over one year) under the federal sentencing guidelines. *Id.* The defendant had been convicted of assault in the fourth degree, which is generally a misdemeanor that carries a one-year maximum sentence, but which is enhanced to a felony with a five-year maximum sentence when the offense is committed in the presence of the victim's minor child. *Id.* at 909-10. The defendant argued that his case was like the court's precedent recidivist enhancement cases and, therefore, the enhancement could not be considered in determining the maximum sentence. *Id.* at 910. The court of appeals rejected that argument, distinguishing *Moreno-Hernandez* from recidivist enhancement cases and stating that, for enhancements due to the circumstances of the actual offense,

the sentencing factor is based on circumstances of the crime itself. *Id.* at 909 ("Substantive offense-based enhancements are inseparable from the underlying offense and must be considered in determining the maximum available sentence."). By contrast, the court held, recidivist enhancements may *not* be considered as part of the sentence for the underlying offense as they are not based on the circumstances of the crime but rather on an "aspect of the defendant's legal history" that is unrelated to the subsequent offense. *Id.*

The Ninth Circuit's decision in the case at bar erred in failing to apply this same reasoning to Petitioner's case. Petitioner's sentence enhancement, pursuant to California Health & Safety Code § 11370.2, was purely based on Petitioner's status as having been previously convicted of a controlled substance offense. *See People v. Gokey*, 73 Cal. Rptr. 2d 134, 136 (1998) ("[California Health and Safety Code] section 11370.2 . . . impose[s] additional punishment for the status of the offender, and not the acts or omissions underlying the current offense."). Unlike the enhancement statute at issue in *Moreno-Hernandez*, the enhancement in the instant case was not based on any act or element of the substantive offense and, therefore, the time Petitioner served for "the substantive offense [should] be considered independently of any recidivist sentencing enhancement." *Moreno-Hernandez*, 419 F.3d at 910. In the instant case, therefore, the time Petitioner served pursuant to the recidivist enhancement should not have been counted as part of the

time served *for* his underlying aggravated felony conviction. The court of appeals' conclusion to the contrary was clearly erroneous and merits this Court's review.

3. The Court of Appeals' Decision in Petitioner's Case Raises Substantially the Same Issues Regarding Recidivist Sentencing Enhancements as This Court Has Granted Certiorari to Consider in *United States v. Rodriquez*, No. 06-1646

The Ninth Circuit has also more recently applied the same basic analysis in *United States v. Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), as it had previously done in *Corona-Sanchez*, *supra*, and *Rusz*, *supra*. This Court granted certiorari in *Rodriquez* on September 25, 2007, set an expedited briefing schedule, and has set the case for oral argument on January 15, 2008. *United States v. Rodriquez*, Case No. 06-1646. The question presented in *Rodriquez* is as follows:

> The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia*, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i). The question presented is: Whether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a

> recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2000 & Supp. IV 2004).

Id. Thus, in granting certiorari, this Court has only just recently found that the interplay between sentences for substantive offenses and sentences for recidivist enhancements – exactly the issue in Petitioner's case – warrants this Court's review.

In *Rodriquez*, the Ninth Circuit had determined that a conviction for delivery of a controlled substance, which carried a maximum five year sentence on its own (but a ten year sentence when coupled with a recidivist enhancement), did not qualify as a predicate drug offense (which required a ten year sentence) for purposes of increasing the defendant's sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)(1). *Rodriquez*, 464 F.3d at 1081-82. Importantly, the court of appeals rejected the government's argument that, because the substantive statute at issue only required that it be an offense "*involving*" a controlled substance, that language was so expansive as to include recidivist offenses. *Id.* at 1082. As the court of appeals explained:

> By urging us to conclude that the term "involving" is so broad as to "encompass[] recidivist offenses," the government is, in effect, contending that the drug offenses should be interpreted as subsuming corollary recidivism enhancements. *That interpretation would effectively render "offense" and "sentencing enhancements" coterminous, a*

> *result that is foreclosed by Supreme Court precedent.*

Id. at 1081 (emphasis added), *citing Apprendi v. New Jersey*, 530 U.S. at 488. The court concluded that, "[h]owever the government frames its argument, the essence of its request is that we consider the offense and the sentencing enhancement together. But that is precisely what is forbidden by *Corona Sanchez* and its progeny." *Id.* at 1082. *See also United States v. Arellano-Tortes*, 303 F.3d 1173, 1178 (9th Cir. 2002) (applying the reasoning in *Corona-Sanchez* to a federal Sentencing Guidelines case to hold that only the prison term for the underlying offense, and not including any recidivist sentencing enhancements, may be considered in determining whether that offense constitutes a "felony" under the applicable statutes).

The recidivist sentencing enhancement issue that this Court has granted certiorari to consider in the context of the Armed Career Criminal Act, 18 U.S.C. § 924(e) (2000 & Supp. IV 2004) ("ACCA") also arises in the context of other criminal and immigration statutes, including IMMACT, the immigration statute at issue in Petitioner's case. Just as this Court found that this important and far-reaching issue warrants review in *Rodriquez*, so it should find that it warrants review in Petitioner's case as well. Thus, Petitioner respectfully requests that this Court grant certiorari in Petitioner's case and reverse the Ninth Circuit decision.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

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December 27, 2007

488 F.3d 1122

United States Court of Appeals, Ninth Circuit.
Victor SARAVIA-PAGUADA, Petitioner,
v.
Alberto R. GONZALES,
Attorney General, Respondent.
No. 05-73098.

Argued and Submitted Feb. 13, 2007.
Filed May 21, 2007.

Marc Van Der Hout, San Francisco, CA, for the petitioner.

Edward A. Olsen, Assistant United States Attorney, San Francisco, CA, for the respondent.

On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A17-266-808.

Before: RONALD M. GOULD and JOHNNIE B. RAWLINSON, Circuit Judges, and ALFRED V. COVELLO,* Senior District Judge.

GOULD, Circuit Judge.

In 1988, Petitioner, Victor Saravia-Paguada, a legal permanent resident ("LPR"), was convicted of several felonies in California, for which he served three years and two months in prison. After his release, Petitioner conceded deportability but requested

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* The Honorable Alfred V. Covello, Senior United States District Judge for the District of Connecticut, sitting by designation.

discretionary relief under former § 212(c) of the Immigration and Naturalization Act ("INA"). While his deportation proceedings were pending, in 1992 Petitioner was again convicted for felony offenses and received a sentence of six years and four months, which reflected in part a three-year recidivist enhancement. Petitioner served three years and three months of this sentence. In 2002, the Board of Immigration Appeals ("BIA") summarily affirmed the immigration judge's ("IJ") pretermitting of relief under former § 212(c) because, by an intervening act of Congress, eligibility for relief was barred for any alien who has been convicted of "one or more aggravated felonies and has served for such felony or felonies" a term of imprisonment of at least five years. *See* § 306(a)(10) of the Miscellaneous and Technical Immigration and Naturalization Amendments, Pub.L. No. 102-232, 105 Stat. 1733, 1751 (effective Dec. 12, 1991) ("Technical Amendments") (modifying § 511(a) of the Immigration Act of 1990, Pub.L. No. 101-649, 104 Stat. 4978, 5052 (effective Nov. 29, 1990) ("IMMACT")).[1] Petitioner petitions for review of the BIA's summary affirmance, claiming that time served pursuant to the recidivist statute should not have been counted for purposes of the IMMACT bar, and, in the alternative, that applying

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[1] When referring generically to the eligibility bar to those aliens who served at least five years for aggravated felonies under these amendatory statutes, we use the denomination "IMMACT provisions" or "IMMACT bar" where there is no significant difference between the two statutory versions.

the IMMACT bar to the 1988 sentence had an impermissibly retroactive effect on the criminal conduct underlying Petitioner's convictions. We deny the petition for review.

I

The Petitioner is a Honduran national who has been an LPR in the United States since 1966 and has returned to Honduras only once for a brief stay. Petitioner asserts that he was raised in the United States from an early age and has no appreciable ties to his native country. Petitioner also asserts that his mother, daughter and siblings are either U.S. citizens or LPRs who live in the United States.

On October 19, 1988, a jury in California convicted Petitioner of the following offenses: (1) possession of cocaine for sale in violation of California Health and Safety Code § 11351; (2) possession for sale of methamphetamine in violation of California Health and Safety Code § 11378; (3) conspiracy to sell cocaine and methamphetamine in violation of California Penal Code § 182.1 and California Health and Safety Code §§ 11352 and 11379; and (4) possession of a throwing star in violation of California Penal Code § 12020(c). The superior court in Santa Clara County imposed a prison term of five years and eight months, of which Petitioner served three years and two months.

On May 2, 1990, the former Immigration and Naturalization Service ("INS") initiated deportation

proceedings under former § 241(a)(11) of the INA, 8 U.S.C. § 1251(a)(11), in connection with Petitioner's conviction for possession of cocaine for sale. Conceding deportability, Petitioner sought discretionary relief under former § 212(c) of the INA, 8 U.S.C. § 1182(c) (1996). While the deportation proceedings were pending, however, Petitioner was convicted on June 30, 1992, after a guilty plea, for violation of California Health and Safety Code §§ 11378 (possession for sale of methamphetamine) and 11358 (cultivation of marijuana). This time the Santa Clara County superior court imposed a sentence of six years and four months, which in part reflected a three-year sentencing enhancement pursuant to a recidivist statute, California Health and Safety Code § 11370.2, in light of Petitioner's prior convictions. Petitioner served three years and three months.

On February 23, 1996, the IJ pretermitted § 212(c) relief because he determined that Petitioner served in aggregate six years and five months for the 1988 and 1992 aggravated felony convictions.[2] The IJ

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[2] In the briefing, Petitioner asserts that he served only two years and one month for the 1988 convictions. This calculation is belied by Petitioner's testimony before the IJ and the state court criminal records. Before the IJ, Petitioner attempted to shorten the period of incarceration for the 1988 convictions by calculating from the time of his sentencing in 1988 to reach the figure of two years and one month. The IJ rejected Petitioner's contention that pre-trial or pre-sentencing detention did not count as "time served," concluding that the theory was foreclosed under *Matter of Valdovinos,* 18 I. & N. Dec. 343, 344 (1982). Based on Petitioner's prison records, the IJ found that Petitioner entered the

(Continued on following page)

rested his decision on an intervening amendment to § 212(c) that barred relief for any alien who has been convicted of "one or more aggravated felonies and has served for such felony or felonies" a term of imprisonment of at least five years.[3] *See* § 306(a)(10) of the

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California prison system on November 17, 1987 at the time of his arrest and was paroled on January 14, 1991. The resulting total is three years, one month and twenty-seven days, or nearly three years and two months as the IJ concluded. As for the 1992 convictions, Petitioner testified consistent with his prison records that he had been arrested on April 7, 1992 and released from prison on August 4, 1995, indicating roughly a three-year and four-month term of incarceration. However, the IJ settled on a more conservative figure of three years and three months.

[3] We note as background that Petitioner's convictions occurred during a period in the development of this country's immigration laws, which increasingly restricted availability of relief for LPRs convicted of felony offenses. Previous to IMMACT's passage, "§ 212(c) allowed the Attorney General to grant discretionary waivers of relief from deportation for aliens who were lawful permanent residents of the United States and who had accrued seven consecutive years of lawful unrelinquished domicile in the United States." *Toia v. Fasano,* 334 F.3d 917, 918 (9th Cir.2003). After Petitioner's 1988 convictions, Congress made relief unavailable for an alien "who has been convicted of an aggravated felony and served a term of imprisonment at least five years." *See* § 511(a) of the IMMACT. In 1991, Congress inserted the "for such felony or felonies" language into § 511(a) of the IMMACT to "clarify that the bar [to § 212(c) relief] applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years." *See Toia,* 334 F.3d at 919 n. 1; § 306(a)(10) of the Technical Amendments. In 1996, Congress eliminated § 212(c) relief for convictions of controlled-substance violations and aggravated felonies regardless of the amount of time served. *See* § 440(d) of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104-132, 110 Stat. 1214, 1277 (1996). Finally, under the Illegal Immigration Reform and

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Technical Amendments. The IJ recited Petitioner's convictions and acknowledged that no party disputed that the convictions were accurately characterized as aggravated felonies. The IJ also rejected Petitioner's interpretation of § 306(a)(10) that time served pursuant to the three-year sentencing enhancement due to his 1992 convictions could not be counted toward the five-year IMMACT bar. Noting that "the enhancement itself cannot be regarded as a conviction independent of other convictions," the IJ concluded that it was indisputable that the "enhancement . . . imposed on Mr. Saravia in 1992 was part of the sentencing for the conviction . . . for the violation of California Health and Safety Code § 11378." The BIA affirmed the IJ on March 24, 1997, but remanded the case with leave for Petitioner to file a motion to reopen under *Matter of Soriano,* 21 I. & N. Dec. 516 (B.I.A.1996).[4] On May 30, 2002, the IJ determined that *Matter of Soriano* did not apply to Petitioner's circumstances and ordered him deported under the previous findings from the February 26, 1996 hearing. The BIA affirmed the decision summarily on

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Immigrant Responsibility Act ("IIRIRA"), Pub.L. No. 104-208, § 304(b), 110 Stat. 3009, 3009-597 (1996), a waiver of relief from deportation under § 212(c) was repealed and replaced with cancellation of removal, which is unavailable to any alien with an aggravated felony conviction. *See*8 U.S.C. § 1229.

[4] *Matter of Soriano,* allowed repleading in cases where a petitioner relied on the availability of § 212(c) relief in conceding deportability before passage of § 440(d) of AEDPA. *See* 21 I. & N. Dec. at 520.

September 25, 2002. Under § 309(c)(4)(G) of IIRIRA, we then dismissed Petitioner's initial petition for review for lack of jurisdiction.

After Petitioner was ordered to appear for deportation, he filed a petition for writ of habeas corpus on September 17, 2004 in the Northern District of California, asserting that the IJ erroneously concluded that § 212(c) relief was unavailable. The district court denied the habeas petition because Petitioner had served more than five years for his aggravated felony convictions, which, "under the plain language of the [IMMACT]," barred § 212(c) relief. After Petitioner filed a motion to amend the judgment under Federal Rule of Civil Procedure 59(e), Congress passed the REAL ID Act, Pub.L. No. 109-13, 119 Stat. 231 (2005), which required the district court to transfer the case to us for consideration of the habeas claims as a petition for review.[5] *See* 8 U.S.C. § 1252(a)(2)(D)(5); *Smolniakova v. Gonzales,* 422 F.3d 1037, 1044 (9th Cir.2005).

II

Petitioner first argues that the IJ erroneously included time served pursuant to the three-year sentence enhancement under California Health and Safety Code § 11370.2, when concluding that Petitioner had

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[5] Under the REAL ID Act, we retain jurisdiction over "constitutional claims or questions of law raised upon a petition for review filed with an appropriate court." *See* 8 U.S.C. § 1252(a)(2)(D).

served more than five years for his aggravated felony convictions.[6] Petitioner claims that our authority in *United States v. Corona-Sanchez,* 291 F.3d 1201 (9th Cir.2002), and *Rusz v. Ashcroft,* 376 F.3d 1182 (9th Cir.2004), supports his contention.[7]

Petitioner's reliance on *Corona-Sanchez* and *Rusz* is misplaced. In *Corona-Sanchez,* we rejected the Government's theory that a conviction for petty theft under California Penal Code §§ 484(a) and 488, which resulted in a two-year sentence under California Penal Code § 666 (a recidivist statute), was an "aggravated felony" for purposes of increasing the penalty for a

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[6] As a remedy, Petitioner asks us to prorate the time served for the 1992 substantive offenses as separate from time served under the three-year enhancement. Petitioner reckons that of the 76-month sentence for the 1992 convictions, 36 months are attributable to the sentencing enhancement and 40 months are attributable to the substantive offenses. Petitioner calculates that 47% of the 39 months served should be prorated such that only "one year and 6.3 months" may be counted for purposes of the five-year prison term that bars relief. Thus Petitioner calculates that his "time served" amounts to only four years and 8.3 months so as to escape the IMMACT bar to § 212(c) eligibility.

[7] When the BIA does not perform an independent review of the IJ's decision we review the IJ's decision. *See Khup v. Ashcroft,* 376 F.3d 898, 902 (9th Cir.2004). We review "determination of purely legal questions regarding the Immigration and Nationality Act de novo," *Kankamalage v. INS,* 335 F.3d 858, 861 (9th Cir.2003), "the same standard we apply when reviewing a district court's decision to deny a habeas petition . . . [except that] we now review the BIA's decision, not the district court's orders." *Alvarez-Barajas v. Gonzales,* 418 F.3d 1050, 1053 (9th Cir.2005) (internal citation omitted).

violation of 8 U.S.C. § 1326(a) (being a deported alien found in the United States). *Corona-Sanchez,* 291 F.3d at 1208-09. We reached this decision because *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), required a court in the context of federal sentence enhancements to "examine the prior crimes by considering the statutory definition of the crimes categorically, without reference 'to the particular facts underlying those convictions' . . . [and] without considering separate recidivist sentencing enhancements." *Corona-Sanchez,* 291 F.3d at 1208-09 (quoting *Taylor,* 495 U.S. at 600, 110 S.Ct. 2143). We recognized this distinction because "'recidivism does not relate to the commission of the offense.'" *Id.* at 1209 (quoting *Apprendi v. New Jersey,* 530 U.S. 466, 488, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

In *Rusz,* we likewise declined to characterize a petty theft conviction under California Penal Code §§ 484(a) and 488 as an offense "for which a sentence of one year or longer may be imposed" under 8 U.S.C. § 1227(a)(2)(A)(i)(II), which barred appellate jurisdiction over a final order of removal, where a statutory maximum sentence of six months was enhanced to three years under § 666. *Rusz,* 376 F.3d at 1183, 1185. In that case we held that the *Taylor* categorical approach required us to separate the substantive misdemeanor offense from the sentencing enhancement in considering the applicability of INA removal provisions. *Id.* at 1185.

Finally, our recent decision in *United States v. Rodriquez,* 464 F.3d 1072 (9th Cir.2006), is congruent with this line of authority and does not assist Petitioner's position. In *Rodriquez,* we considered for federal sentencing enhancement purposes whether a prior conviction for delivery of a controlled substance, in violation of Washington Revised Code § 9A.20.021(1)(c), which carried a maximum term of five years for the substantive crime, but was enhanced to ten years as a "second or subsequent offense[ ]" under a recidivism provision, qualified as a "serious drug offense" under the pertinent definition in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924 *et seq.,* namely "'an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . *for which a maximum term of imprisonment of ten years or more is prescribed by law.*'" *Id.* at 1079 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)) (emphasis in original). Following *Corona-Sanchez,* we held that Rodriquez's prior controlled-substance violation could not be classified as a "serious drug offense," though he received an enhanced sentence of ten years under the recidivist statute, because "recidivism does not relate to the commission of the offense." *Id.* at 1082 (internal quotation marks omitted).

Here, unlike in *Corona-Sanchez, Rusz,* and *Rodriquez,* we do not consider whether or not Petitioner committed certain past crimes, such as an "aggravated felony" or a "serious drug offense," the *nature* of which might give rise to adverse consequences attaching to a

present conviction. For this reason, the traditional concern that recidivism should not inform the nature of an offense, *cf. Apprendi,* 530 U.S. at 488, 120 S.Ct. 2348, is not at play. It is undisputed that Petitioner's 1988 and 1992 offenses were properly characterized as "aggravated felonies." The focus here is on calculating the *amount* of time served *on account* of the felony convictions, which is an inquiry not related to the nature of the offense under the *Taylor* categorical approach and absent from our analysis in *Corona-Sanchez* and its progeny. The question here is straightforward: whether Petitioner "served for such felony or felonies a term of imprisonment of at least 5 years." *See* § 306(a)(10) of the Technical Amendments.

Having rejected the applicability of *Corona-Sanchez, Rusz,* and *Rodriquez* to this context, we recur to the plain meaning of § 306(a)(10) of the Technical Amendments. *See Altamirano v. Gonzales,* 427 F.3d 586, 592 (9th Cir.2005) ("The starting point for our interpretation of a statute is always its language. . . . We begin by looking to the plain meaning of the terms at issue.") (internal citation and quotation marks omitted). "If a statute is silent regarding an issue, we will defer to the interpretation of the administrative agency charged with implementing the statute." *United States v. Lopez-Perera,* 438 F.3d 932, 933 (9th Cir.2006). However, we are not obligated to accept an interpretation clearly contrary to the plain meaning of the statute. *See Chowdhury v. INS,* 249 F.3d 970, 972 (9th Cir.2001).

In interpreting § 306(a)(10), the IJ here found that "the enhancement itself cannot be regarded as a conviction independent of other convictions," concluding that the "enhancement . . . imposed . . . was part of the sentencing for the conviction . . . for the violation of California Health and Safety Code § 11378." Petitioner contends that this finding was in error because the prepositional phrase "for such felony or felonies" inserted into the IMMACT provision under § 306(a)(10) qualifies any time served so as to bracket out time served pursuant to an enhancement as distinct from the aspect of the sentence attributable to the substantive offense. This reading is unpersuasive.

Nothing in the language of § 306(a)(10) suggests that an enhanced sentence may not be imposed "for such felony or felonies." As the IJ reasonably concluded, the enhancement is not separable from the sentence. Rather, the enhancement is, by definition, "an additional term of imprisonment added to the base term," *see People v. Wims,* 10 Cal.4th 293, 41 Cal.Rptr.2d 241, 895 P.2d 77, 83 (1995) (internal quotation marks and citation omitted), which is imposed because of some aggravating circumstance such as recidivism. Because the terms of the statute require a court only to determine the ultimate amount of time served, it is immaterial whether a sentencing enhancement may have increased the base term. Moreover, Petitioner's interpretation based on a misapplication of *Corona-Sanchez* also creates practical difficulties Congress cannot have

intended. Under Petitioner's approach, an IJ, when calculating the time served, would be forbidden from examining circumstances underlying the substantive offense, including recidivist concerns and any other aggravating factors that informed the sentencing court. A requirement to prorate the "time served" based on any conceivable aggravating factors a sentencing judge might apply would be unworkable because the IJ would be forced to contrive proportionate values for each aggravating factor, then deduct those artificial values from the imposed sentence. We reject such an unwieldy approach that is contrary to § 306(a)(10)'s plain meaning.

In a related theory, Petitioner argues that the congressional act itself of amending the IMMACT under § 306(a)(10) to add the prepositional phrase "for such felony or felonies" exhibited an intent that the time served be calculated without regard to sentencing enhancements. Petitioner's argument runs counter to our authority in *Toia v. Fasano,* 334 F.3d 917 (9th Cir.2003). In *Toia,* we acknowledged that the intent of § 306(a)(10) was to "clarify that the bar [to § 212(c) relief] applied to multiple aggravated felons whose aggregate terms of imprisonment exceeded five years," *see id.* at 919 n. 1, rather than basing ineligibility on a prison term of at least five years pursuant to a single conviction. *See De Osorio v. INS,* 10 F.3d 1034, 1037 n. 2 (4th Cir.1993) ("The language of this amendment to § 212(c) was further revised in [§ 306(a)(10)] to clarify that the five-year term could be served for multiple convictions.").

Petitioner cites no relevant authority or legislative history that the congressional intent was otherwise.[8] At most, Petitioner points to a proposed amendment to the INA in the Comprehensive Immigration Reform Act of 2006, which makes explicit that time served under sentencing enhancements may be considered for determining immigration consequences.[9] According to Petitioner, this unenacted bill reflects the fact that under the current law sentencing enhancements may not be included in calculating time served in determining the availability of § 212(c) relief. Even if § 306(a)(10) were ambiguous, this theory runs afoul the canon of construction that "[w]here . . . an act is ambiguous, an amendment thereto is an indication that it is intended to clarify,

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[8] The congressional record is free of specific reference to § 306(a)(10). *See* 137 CONG. REC. S18244 (daily ed. Nov. 26, 1991) (stating Senator Kennedy's description of the Technical Amendments to the IMMACT as "non-controversial but necessary" without mentioning § 306(a)(10)); *see also* Iris Gomez, *The Consequences of Nonappearance: Interpreting New Section 242b of the Immigration and Nationality Act*, 30 San Diego L.Rev. 75, 94-95 (1993) (reciting legislative history of the Technical Amendments without noting particular rationale for enactment of § 306(a)(10)).

[9] This unenacted federal legislation concerns the following proposed amendment to the definition of "aggravated felony" under 8 U.S.C. § 1101(a)(43): "[T]he term 'aggravated felony' applies to an offense described in this paragraph, whether in violation of Federal or State law . . . for which the term of imprisonment was completed within the previous 15 years, *even if the length of the term of imprisonment is based on recidivist or other enhancements*. . . ." Comprehensive Immigration Reform Act, S.R. 2611, 109th Cong. § 203 (2006) (emphasis added).

rather than change, the existing law." *See Bedoni v. Navajo-Hopi Indian Relocation Comm'n,* 878 F.2d 1119, 1121 (9th Cir.1989) (internal quotation marks and citation omitted).

Under the plain meaning of the IMMACT provisions, we conclude that an IJ may include time served under a recidivist statute or any other sentencing enhancement when considering eligibility for relief under former § 212(c). In pretermitting relief, the IJ reasonably interpreted this statutory command and properly calculated the time served based on both the sentence attributable to the 1992 substantive offenses and the sentencing enhancement under California Health and Safety Code § 11370.2.

III

In his alternative claim, Petitioner argues that the IJ's application of the IMMACT bar to his 1988 sentence had an impermissibly retroactive effect by attaching new legal consequences to the criminal conduct underlying the convictions.[10]

The Government claims that Petitioner waived his retroactivity argument under 8 U.S.C. § 1252(d)(1) because it was not raised before the IJ or BIA. Petitioner responds that we have jurisdiction over the retroactivity claim because due process concerns are

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[10] "We review de novo whether a statute may be applied retroactively." *Scott v. Boos,* 215 F.3d 940, 942 (9th Cir.2000).

implicated. Alternatively, Petitioner argues that it would have been futile to assert such a claim because at the time he sought administrative review, our authority in *Samaniego-Meraz v. INS*, 53 F.3d 254 (9th Cir.1995), *overruled by, Toia,* 334 F.3d 917, precluded the BIA from Considering the retroactivity claim.

As a general rule, we "may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). However, "due process claims . . . are exempt from this administrative exhaustion requirement." *Garcia-Ramirez v. Gonzales,* 423 F.3d 935, 938 (9th Cir.2005) ("Retroactivity challenges to immigration laws implicate legitimate due process considerations that need not be exhausted in administrative proceedings because the Board of Immigration Appeals cannot give relief on such claims."). The Government's exhaustion defense is thus foreclosed by *Garcia-Ramirez*.[11]

Proceeding to the merits, we are guided by our circuit's interpretation of the analytical framework for retroactivity established in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994), and as applied in the immigration context in *INS v. St. Cyr,* 533 U.S. 289, 121 S.Ct. 2271, 150

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[11] Because *Garcia-Ramirez* exempts Petitioner from the exhaustion requirement, we need not address his futility argument.

L.Ed.2d 347 (2001). *See generally Armendariz-Montoya v. Sonchik,* 291 F.3d 1116 (9th Cir.2002).

Under the test in *Landgraf,* when a statutory provision lacks an effective date, we first ask whether Congress has prescribed its temporal reach. *See* 511 U.S. at 280, 114 S.Ct. 1483.[12] "If there is no congressional directive on the temporal reach of a statute, we determine whether the application of the statute to the conduct at issue would result in a retroactive effect." *Martin v. Hadix,* 527 U.S. 343, 352, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (internal quotation marks omitted). Absent an unmistakable congressional directive, we may determine that a statute is impermissibly retroactive if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf,* 511 U.S. at 269, 114 S.Ct. 1483 (internal quotation marks and citation omitted).

In the immigration context, the Supreme Court in *St. Cyr* concluded that "IIRIRA's elimination of any possibility of § 212(c) relief for people who entered into plea agreements with the expectation that they

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[12] Here, it is undisputed that the IMMACT provision is ambiguous with respect to whether Congress intended to apply the five-year eligibility bar to aliens whose convictions occurred before the statute's effective date. *See Tbia,* 334 F.3d at 920 ("Section 511(a) lacks clear, strong language, . . . which can be subject to only one interpretation.").

would be eligible for such relief clearly 'attaches a new disability, in respect to transactions or considerations already past.'" 533 U.S. at 321, 121 S.Ct. 2271 (quoting *Landgraf,* 511 U.S. at 269, 114 S.Ct. 1483). Central to the *St. Cyr* analysis was the nature of the plea agreement and a petitioner's reliance on the pre-IRRIRA availability of § 212(c) relief:

> Plea agreements involve a *quid pro quo* between a criminal defendant and the government. . . . In exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits, such as promptly imposed punishment without the expenditure of prosecutorial resources. . . . There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions. . . . [P]reserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.

Id. at 321-23, 121 S.Ct. 2271 (internal quotation marks, citations, and footnotes omitted).

In our circuit, we have generally limited *St. Cyr* to the factual context of a guilty plea. In *Toia,* we considered a challenge by an LPR to the retroactive application of the bar to § 212(c) relief under § 511(a) of the IMMACT after the petitioner was convicted of a

drug-related aggravated felony on a guilty plea in 1989 and sentenced to ten years imprisonment. 334 F.3d at 918. In that case we held that *St. Cyr* compelled making § 212(c) relief available to the alien despite the pre-IMMACT convictions because his guilty plea evinced the alien's reliance on relief under the then-existing law. *Id.* at 921 ("Extinguishing the availability of § 212(c) relief for aliens who pleaded guilty . . . upsets 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'") (quoting *St. Cyr,* 533 U.S. at 323, 121 S.Ct. 2271).

Outside of the plea bargain context, however, we have declined to invalidate retroactive elimination of § 212(c) relief. In *Armendariz-Montoya,* we held that there was no impermissibly retroactive effect in applying § 440(d) of AEDPA to a petitioner who was convicted pre-AEDPA after a jury trial for a drug-related aggravated felony, but was still in deportation proceedings when AEDPA was enacted. *See* 291 F.3d at 1121-22. In that case, we reasoned that aliens who chose to go to trial "cannot plausibly claim that they would have acted any differently if they had known" about the elimination of § 212(c) relief.[13] *Id.* at 1121.

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[13] Our decision in *Armendariz-Montoya* quoted Judge Posner's rejection of a similar argument:

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported,

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In concluding that such a claimed reliance interest is *per se* unreasonable, we reaffirmed a narrow reading of *St. Cyr* and excluded categorically claims for § 212(c) relief outside the guilty plea context.[14] *Id.* at 1122 ("Armendariz pleaded not guilty and elected a jury trial. Therefore, application of § 440(d) does not result in any retroactive effect.").

The Government contends that *Landgraf*'s second prong, as applied under *St. Cyr* and *Toia*, can be distinguished from the case here, and that the authority in *Armendariz-Montoya* forecloses Petitioner's theory, because Petitioner did not participate in the *quid pro quo* of the plea bargain and thus cannot have reasonably relied on the availability of

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> they could not ask for a discretionary waiver of deportation.

291 F.3d at 1121 (quoting *LaGuerre v. Reno*, 164 F.3d 1035, 1041 (7th Cir.1998)).

[14] Recently, in a case involving a retroactive application of the aggravated felon bar under § 304(b) of IIRIRA, we likewise rejected an argument that § 212(c) relief could be available for an alien convicted preIIRIRA by guilty plea of the aggravated felony of armed imprisonment where in 1978 he seized several foreign nationals at a consulate in Chicago. *See Kelava v. Gonzales*, 434 F.3d 1120, 1122-24 (9th Cir.2006). Although we ultimately denied § 212(c) relief based on AEDPA's independent terrorist activity ground, *id.* at 1126, we expressly affirmed the reasoning of *Armendariz-Montoya* and emphasized that the Supreme Court in *St. Cyr* was "concerned that the alien had detrimentally relied on the availability of § 212(c) relief in entering the plea, giving rise to 'settled expectations' that would be disrupted by the retroactive application of IIRIRA § 304(b)." *Id.* at 1124 (citing *St. Cyr*, 533 U.S. at 323-24, 121 S.Ct. 2271).

discretionary § 212(c) relief prior to the jury trial conviction in 1988. Disregarding the significance of a guilty plea, Petitioner replies that the IMMACT provisions have an impermissible retroactive effect because, as applied to the 1988 convictions, the statutory change subjects him to new legal consequences in regard to his past conduct, i.e. the commission of the underlying criminal acts that gave rise to his 1988 convictions. Petitioner also replies that *Armendariz-Montoya* is not controlling because that case pertained to the retroactive application of § 440(d) of AEDPA, where the alien was convicted pre-AEDPA and requested § 212(c) relief after the effective date of AEDPA. As such, Petitioner argues that *Armendariz-Montoya* did not address the theory that the bar under IMMACT cannot be retroactively applied to the 1988 convictions and the underlying criminal conduct. We agree with the Government.

First, Petitioner's attempt to distinguish *Armendariz-Montoya* based on its varying procedural posture from the case here is unavailing. There is no meaningful difference between Petitioner's and Armendariz's circumstances. Petitioner was convicted in 1988. On May 2, 1990, he was placed in deportation proceedings and requested § 212(c) relief. However, due to Petitioner's 1992 convictions, his claim for § 212(c) relief could not be adjudicated until February 26, 1996, after the IMMACT effective date, at which time his 1992 sentence pushed Petitioner over the five-year limit. Armendariz was convicted of a felony offense in September 1995, was ordered to

show cause on April 5, 1996 why he should not be deported, and in April 1997 requested § 212(c) relief after the effective date of AEDPA. *Armendariz-Montoya,* 291 F.3d at 1118. In both cases, eligibility for § 212(c) relief was withdrawn based on a statute retroactively applied after the aliens had committed acts that resulted first in criminal convictions and then in concessions of deportability from which both sought previously available forms of § 212(c) relief. The fact that different statutes were imposed to bar eligibility is inconsequential for retroactivity analysis so as to distinguish *Armendariz-Montoya*.

Petitioner's main contention that we must consider as past relevant conduct the commission of the underlying crime, irrespective of any specific reliance on the pre-IMMACT law, is squarely foreclosed by *Armendariz-Montoya*. Although *Armendariz-Montoya* did not expressly designate the past relevant conduct, it can be readily inferred from the decision that the past relevant conduct is an alien's decision whether to enter a guilty plea or to proceed to trial, and not the commission of the underlying criminal conduct. *See* 291 F.3d at 1121 ("If those aliens had been aware of § 440(d) at the time of plea, *they might have elected* to proceed to trial in lieu of pleading guilty.") (emphasis added); *see also Ponnapula v. Ashcroft,* 373 F.3d 480, 494 (3d Cir.2004) ("This focus [on the decision] is logical because the reliance interest of an alien who accepts a plea agreement arises at the time the choice is made to accept the agreement. Generally speaking, reliance interests (in the legal sense) arise because

some choice is made evincing reliance.") (citing *Restatement (Second) of Contracts* § 90 (1981) (requiring "action or forbearance" to invoke promissory estoppel)).

Here, Petitioner makes only the unremarkable assertion that "pre-IMMACT alien defendants might either accept a plea or decide to go to trial" where, under the prior law, any sentence the alien received would not be a factor for purposes of determining the availability of § 212(c) relief. *Armendariz-Montoya* negated the premise that new legal consequences arising from a change in statutory regime alone was sufficient to invalidate the retroactive application of the IMMACT provision. *See* 291 F.3d at 1121 (holding that retroactive application of the bar to discretionary relief under § 440(d) of AEDPA for any aggravated felony regardless of time served was permissible *despite* § 440(d)'s displacement of IMMACT's five-year rule); *see also Garcia-Ramirez,* 423 F.3d at 953-54 (rejecting theory that mere change in "statutory structure" could produce an impermissible retroactive effect) (Gould, J., concurring). Under the logic of *Armendariz-Montoya,* Petitioner's claimed reliance interest is *per se* unreasonable because of the "'absurd'" argument that aliens "'might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that . . . they could not ask for a discretionary waiver of deportation.'"

See Armendariz-Montoya, 291 F.3d at 1121 (quoting *LaGuerre,* 164 F.3d at 1041).[15]

Equally unpersuasive is Petitioner's claim that the Government's emphasis on *Armendariz-Montoya* is inapposite because that case is at odds with *Landgraf,* 511 U.S. 244, 114 S.Ct. 1483, and its progeny. In addition to *Landgraf,* Petitioner relies on *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), for the proposition that a court should only examine whether a retroactive application of the new law alters the legal consequences of past relevant conduct, without scrutinizing a particular group's reliance on the former law. It is beyond dispute that these cases did not emphasize a reasonable reliance interest.[16] However, a

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[15] Although the Third Circuit has not confined its retroactivity inquiry to the *quid pro quo* of a guilty plea, it has recognized the validity of *LaGuerre* where an alien might have only an "attenuated" reliance interest in previously available § 212(c) relief because of the law's "causal remoteness" to one's decision-making at the time he commits the underlying offense. *See Ponnapula,* 373 F.3d at 495-496 n. 14 (noting that the Seventh Circuit in *LaGuerre* "properly" recognized the absurdity of such a claim).

[16] In *Landgraf,* the Supreme Court did not inquire into a defendant business owner's reliance on the previous statutory framework where the defendant challenged the retroactive application of provisions in the Civil Rights Act of 1991 that authorized prevailing plaintiffs to recover compensatory and punitive damages for certain violations of Title VII of the Civil Rights Act of 1964. *See* 511 U.S. 248-49, 114 S.Ct. 1483. Likewise, in *Hughes Aircraft,* the Supreme Court held that the elimination of certain defenses to *qui tam* suits under the False

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reliance interest is not inconsistent with this Supreme Court authority. *See Landgraf,* 511 U.S. at 270, 114 S.Ct. ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law *and the degree of connection between the operation of the new rule and a relevant past event.*") (emphasis added). Petitioner overlooks, moreover, that the central focus of *Hadix* and *St. Cyr,* both of which post-date *Landgraf* and *Hughes Aircraft,* was the party's reliance interest. In *Hadix,* the Supreme Court held that an amendment that affected the hourly fee recoverable by attorneys engaged in post-judgment monitoring in prison reform suits was impermissibly retroactive where it reduced their hourly rate for work performed before the effective date of the amendment, *see* 527 U.S. at 347, 360-61, 119 S.Ct. 1998; conversely, however, the *Hadix* court rejected any impermissible effect for work performed after the effective date of the amendment where attorneys claimed only that they could not ethically withdraw from the case. *Id.* at 361, 119 S.Ct. 1998. In acknowledging a reasonable reliance standard, the *Hadix* court reasoned: "To impose . . . new standards now, for work performed before the [amendments]

Claims Act could not be applied retroactively to Hughes Aircraft without requiring a showing that Hughes Aircraft, or similarly situated government contractors, relied on the eliminated defense to its detriment. 520 U.S. at 950, 117 S.Ct. 1871.

became effective, would upset the reasonable expectations of the parties"; whereas "[a]fter [the effective date], any expectation of compensation at the [preamendment] rates was unreasonable." *Id.* at 360, 119 S.Ct. 1998. The Supreme Court in *St. Cyr* similarly highlighted a reliance interest in an alien's *quid pro quo* expectations at the plea bargain. 533 U.S. at 323, 121 S.Ct. 2271. In light of this authority, we reject Petitioner's position that our emphasis on an alien's reasonable reliance on a prior law is inconsistent with Supreme Court precedent.

In a final effort to avoid the force of *Armendariz-Montoya,* Petitioner argues that the Supreme Court's decision in *Fernandez-Vargas v. Gonzales,* ___ U.S. ___, 126 S.Ct. 2422, 165 L.Ed.2d 323 (2006), overruled our controlling authority. In *Fernandez-Vargas,* the Supreme Court addressed the reinstatement provisions for removal orders under § 241(a)(1) of IIRIRA, which displaced a previous statutory exemption of certain classes of illegal reentrants and authorized the removal of any alien under a previous deportation order entered after the time of illegal reentry. 126 S.Ct. at 2426. The Supreme Court concluded that Fernandez-Vargas, who had illegally reentered the United States in 1982 well before the advent of § 241(a)(1), suffered no retroactive effect of the sterner reinstatement provisions because unlike the past, completed conduct of the *quid pro quo* plea deal in *St. Cyr,* "the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, [is the conduct] that

subjects him to the new and less generous legal regime, not a past act that he is helpless to undo up to the moment the Government finds him out." *Id.* at 2432. Rejecting Fernandez-Vargas's claims that he would have had recourse to certain forms of discretionary relief but for application of § 241(a)(1), the Supreme Court stated:

> These putative claims to relief are not "vested rights," a term that describes something more substantial than inchoate expectations and unrealized opportunities. . . . Fernandez-Vargas's claim to such relief was contingent, and it was up to him to take some action that would elevate it above the level of hope. It is not that these forms of relief are discretionary, . . . it is rather that before IIRIRA's effective date Fernandez-Vargas never availed himself of them or took action that enhanced their significance to him in particular, as St. Cyr did in making his quid pro quo agreement.

Id. at 2432 n. 10 (internal citations and quotation marks omitted). Contrary to Petitioner's contention, the *Fernandez-Vargas* decision thus reinforces the central premise in *Armendariz-Montoya* that an alien must demonstrate some affirmative reliance on a previously available immigration benefit to show impermissible retroactivity.

Under *Armendariz-Montoya,* an alien's *decision* to enter a guilty plea or proceed to trial is the past relevant conduct for purposes of *Landgraf* analysis,

not the commission of the underlying crime. We hold that application of the IMMACT provisions to time served for criminal sentences that stemmed from jury convictions pre-dating both §§ 511(a) of the IMMACT and 306(a)(10) of the Technical Amendments creates no impermissibly retroactive effect. The IJ, therefore, did not erroneously include the three years and two months served for the 1988 convictions in concluding that § 212(c) relief was barred because of IMMACT's rule that aliens who served five years or more for one or more aggravated felony convictions may not gain discretionary waiver of relief from deportation.

PETITION DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR SARAVIA-PAGUADA, Petitioner, v. JOHN ASHCROFT, Attorney General, Respondent.	No. 02-73509 Agency No. A17-266-808 ORDER (Filed Jun. 24, 2004)

Before: LEAVY, THOMAS and FISHER, Circuit Judges

Respondent's motion to dismiss this petition for review for lack of jurisdiction is granted. *See* 8 U.S.C. § 1252(a)(2)(C). The temporary stay of removal confirmed by Ninth Circuit General Order 6.4(c) shall continue in effect until issuance of the mandate.

All other pending motions are denied as moot.

DISMISSED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Date: SEP 25 2002

File: A17 266 808 – San Francisco

In re: VICTOR *SARAVIA*-PAGUADA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Martin Resendez Guajardo, Esquire

ON BEHALF OF SERVICE:
James S. Stolley, Jr.
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).[1]

/s/ Frederick D. Hess
FOR THE BOARD

[1] The respondent's appeal from the Immigration Judge's February 23, 1996, oral decision is before us again by certification of the Immigration Judge in his order of May 30, 2002, following our remand of July 15, 1997.

UNITED STATES IMMIGRATION COURT
550 Kearny Street, Room 800
San Francisco, California 94108

In the Matter of:

Victor Manuel Saravia-Paguada

Case Number: A17 266 808
(Deportation Proceedings)

* * *

ORDER OF THE IMMIGRATION JUDGE

On July 15, 1997, the Board of Immigration Appeals remanded this matter to the Court to allow the respondent to contest deportability under *Matter of Soriano,* Interim Dec. 3289 (AG 1997). The Court now confirms its earlier order of deportation, dated February 23, 1996.

These deportation proceedings began in 1991 when the Order to Show Cause (Exhibit One) was filed. The respondent, through counsel, admitted the truth of the allegations on the Order to Show Cause and conceded that he is deportable as charged under section 241(a)(11) of the Immigration and Nationality Act.

Thereafter, the Court accepted and adjudicated the respondent's application for relief under section 212(c) of the Act. The hearing was conducted in 1992 and 1996. The long time between hearings was due to the fact that, in the course of the deportation proceedings, the respondent was convicted for further violations of the California Penal Code and was

incarcerated thereunder for several years. The state of the case and the respondent's criminal history are discussed in detail in this Court's Oral Decision dated February 23, 1996.

In its decision, the Court denied the application under section 212(c) of the Act and ordered the respondent's deportation to Honduras.

The respondent appealed the Court's order. On March 24, 1997, the Board dismissed the respondent's appeal under *Matter of Soriano, supra,* but under that decision also left open the opportunity for the respondent to move to reopen the proceedings to contest deportability.

The respondent made such a motion and the Board issued the remand order of July 15, 1997, which returned the case to this Court.

The Court, does not believe that *Matter of Soriano* requires repleading in the circumstances of this case. *Soriano* ruled that section 440(d) of the Antiterrorist and Effective Death Penalty Act (AEDPA) barred all pending section 212(c) applications of aggravated felons. *Soriano* allows repleading in cases in which, before the *Soriano* decision issued, a respondent conceded deportability in the expectation of promoting an application under section 212(c) of the Act, but was eventually unable to promote the application because the *Soriano* decision intervened between pleading and application.

This case does not come within *Soriano* in any respect. All proceedings here were completed long before *Soriano* and several months before the enactment of

AEDPA. The respondent's expectations as to promoting his application under section 212(c) of the Act were not ever frustrated. Instead, the respondent had the opportunity to present his entire case.

What *Soriano* did frustrate in this case is the respondent's appeal from the Court's order of February 23, 1996. By the time the appeal was ready for adjudication, *Soriano* had issued and the Board of Immigration Appeals ruled that respondent was ineligible for section 212(c) relief. Thereafter, the Board granted the motion to reopen under *Soriano* that has brought the matter to this Court.

In this Court's view, the record is now ready for review on appeal. Accordingly, the Court issues the following order.

ORDER: It is ordered that the respondent be deported to Honduras which is his country of citizenship and nationality.

ORDER: This case is certified to the Board of Immigration Appeals under 8 CFR section 240.1(a).

Dated: May 30, 2002

/s/ Lawrence N. DiCostanzo
Lawrence N. DiCostanzo
Immigration Judge

cc: Zaheer Zâidi
James Stolley

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Date: JUL 15 1997

File: A17 266 808 – San Francisco

In re: VICTOR *SARAVIA*-PAGUADA

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Martin Resendez Guajardo, Esquire
600 Montgomery Street, 45th Floor
San Francisco, California 94111-2702

ORDER:

PER CURIAM. The motion to reopen is granted. The case is reopened for the purpose of contesting deportability in accordance with the Attorney General's decision in *Matter of Soriano,* Interim Decision 3289 (A.G., Feb. 21, 1997). The record is remanded to the Immigration Judge for further proceedings consistent with this order.

/s/ Paul W. Schmidt
FOR THE BOARD

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Date: MAR 24 1997

File: A17 266 808 – San Francisco

In re: VICTOR *SARAVIA*-PAGUADA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Martin R. Guajardo, Esquire
600 Montgomery Street, 45th Floor
San Francisco, California 94111

ORDER:

PER CURIAM. You are seeking relief from deportation under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). However, you are statutorily ineligible for such relief as an "alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are covered by section 241(a)(2)(A)(i)." *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") § 440(d); *Matter of Soriano,* Interim Decision 3289 (A.G., Feb. 21, 1997). Accordingly, your appeal is dismissed.

You have argued on appeal the AEDPA violates the equal protection clause of the Constitution because the new 212(c) provisions apply only in deportation proceedings and not in exclusion proceedings. The issue of whether the AEDPA 212(c) restrictions apply in exclusion proceedings has not yet been decided. However, even assuming that section 212(c) relief is now more widely available in exclusion proceedings than in deportation, we cannot rule on the constitutionality of laws enacted by Congress. *See, e.g., Matter of C-*, 20 I&N Dec. 529 (BIA 1992).

If you conceded deportability prior to the enactment of AEDPA on April 24, 1996, in reliance on the availability of section 212(c) relief, you may have proceedings reopened for the limited purpose of contesting deportability. *See Matter of Soriano, supra.* If you wish to have proceedings reopened for this limited purpose, you must submit a signed written request to that effect directly to the Board, at the address on the attached letter, without payment of any fee. Please include a copy of this decision with any such request and mark "SORIANO REOPENING" on the request and on the outside of the envelope. You must serve a copy of such request on the Immigration and Naturalization Service.

/s/ [Illegible]
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
San Francisco, California

File No.: A 17 266 808 February 23, 1996

In the Matter of)
) IN DEPORTATION
VICTOR SARAVIA-PAGUADA) PROCEEDINGS
Respondent)

~~CHARGE:~~

~~APPLICATIONS:~~

ON BEHALF OF RESPONDENT:
Martin Guarjardo, Esquire

ON BEHALF OF SERVICE:
James Stolley, Jr., Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent, Mr. Victor Saravia-Paguada, is a native and citizen of Honduras. At this time he is 31 years of age. The respondent immigrated to the United States in the year 1966 when he was approximately 1 year of age.

The Order to Show Cause in this matter was issued on May 2, 1990. It is *Exhibit* 1 in the record of proceedings. This Order to Show Cause charges that Mr. Saravia is deportable under former Section 241(a)(11) of the Immigration and Nationality Act. The Court notes that the successor statute to Section 241(a)(11) is Section 241(a)(2)(B) of the present version of the Act.

The ground for the charge of deportability was Mr. Saravia's October 19, 1988, conviction for the possession for sale of cocaine in violation of California Penal Code Section 11351.

Through his then counsel, Mr. Saravia admitted the truth of all of the allegations of the Order to Show Cause and has conceded that be was deportable as charged under Section 241(a)(11) of the Act. On this basis, I must find that the allegations of the Order to Show Cause have been established by clear, unequivocal and convincing evidence. Therefore, I must find that the respondent is deportable under Section 241(a)(11 of the Act.

The only application for relief from deportation that Mr. Saravia has filed is an application under Section 212(c) of the Immigration and Nationality Act. This application was filed with the Court originally on August 20, 1991. The application form itself [(]that is, form I-191, plus certain attached documents[)] is *Exhibit* 2 in the record of proceedings in this case.

The Court must relate some procedural background ~~of this case~~ before turning in greater detail to the application for relief under Section 212(c) of the Act. Originally the application for Section 212(c) relief was filed so that Mr. Saravia could seek a waiver of the 1988 offense alleged in the Order to Show Cause. For this purpose the Court conducted a hearing on the application on January 31, 1992. At

that time Mr. Saravia was represented by former counsel.

The Court calendared a decision on the application for relief under Section 212(c) of the Act for September 3, 1992. The matter, however, could not go forward on that date because, as then counsel informed the Court, Mr. Saravia was unable to attend the hearing due to an intervening incarceration; that is, an incarceration since the hearing conducted January 31, 1992.

This intervening incarceration occurred because Mr. Saravia had been convicted on June 30, 1992, for the possession or purchase for sale of methamphetamine in violation of California Health and Safety Code Section 11378 and for the cultivation of marijuana in violation of California Health and Safety Code Section 11358.

When Mr. Saravia had completed his incarceration on this intervening conviction, he was returned by the State of California to the custody of the Immigration and Naturalization Service. The hearing in Mr. Saravia's case which had been interrupted, as it were, in September 1992, then began again in the fall of 1995.

The present issue in the matter of Mr. Saravia's application for relief under Section 212(c) is whether he is barred from applying for such relief under the last sentence of Section 212(c) of the Act. This sentence reads as follows: "The first sentence of this subsection shall not apply to an alien who has been

convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least five years." The first sentence referred to in this quoted language is the ~~general~~ sentence providing [generally /s/ LND] the criteria for eligibility for relief under Section 212(c) of the Act.

This last sentence of Section 212(c) of the Act was added to the Immigration and Nationality Act by Section 511(a) of the Immigration Act of 1990 as modified by Section 306(a)(10) of the [M]iscellaneous and [T]echnical Immigration and Naturalization [A]mendments of 1991. The last sentence is applicable to admissions occurring after November 29, 1990, which is the date of the enactment of the Immigration Act of 1990. In this respect, the Court refers to Section 511(b) of the Immigration Act of 1990. There is no question that the last sentence of Section 212(c) of the Act is relevant to decision here.

In determining the effect of the last sentence of Section 212(c) of the Act on Mr. Saravia's case, the Court will first describe the evidence in this matter as it relates to Mr. Saravia's convictions and incarcerations.

Mr. Saravia's first conviction or convictions are memorialized in the documents which are *Exhibit* 4 in this record of proceedings. These documents indicate that Mr. Saravia was convicted on certain violations of the California law after a jury trial. The conviction occurred on October 19, 1988. The sentencing on the conviction occurred on November 10, 1988.

Mr. Saravia was convicted as follows: First, he was convicted ~~on~~ [of /s/ LND] a conspiracy to sell methamphetamine and cocaine in violation of California Penal Code Section 182.1 and California Health and Safety Code Sections 11352 and 11379. For this conviction Mr. Saravia was sentenced to four years imprisonment.

Exhibit 4 also shows that Mr. Saravia was additionally convicted for possession of cocaine for sale in violation of California Health and Safety Code Section 11351. For this conviction he was sentenced to one year imprisonment to be served consecutively to the four-year term that the Court has just described.

In 1988 Mr. Saravia was also convicted of possession of methamphetamine for sale in violation of California Health and Safety Code Section 11378. For this conviction he was sentenced to eight months imprisonment consecutive to the four-year term and one-year term that the Court has discussed above.

The judgment in *Exhibit* 4 indicates that Mr. Saravia was remanded "forthwith" for presentation to the California Department of Corrections for imprisonment. It also shows that the total sentence imposed on Mr. Saravia in 1988 was a sentence of five years, eight months. The judgment further shows that Mr. Saravia was given credit for time served prior to conviction or sentencing. This credit amounted to 537 days of which he appears to have actually spent 358 days in custody.

Mr. Saravia testified as to the time he spent in incarceration. His testimony was to the effect that he had been arrested on November 22, 1987, and that he had been held continuously through trial, conviction and sentencing. He further testified that he remained imprisoned until January 1991. On the basis of Mr. Saravia's testimony, it therefore appears that Mr. Saravia spent two years, two months in imprisonment after sentencing or three years, two months in incarceration after his arrest.

Mr. Saravia's testimony regarding the time he served in prison is corroborated to a degree by *Exhibit* 7. This exhibit shows that Mr. Saravia entered into the California prison system on November 17, 1988, and was paroled on January 14, 1991. *Exhibit* 7 does have an interesting notation to the effect that Mr. Saravia had been "temporarily released" between the dates May 17, 1990 and May 31, 1990. Even assuming what appears to be the unlikely event that this temporary release ~~stands for~~ [was /s/ LND] a type of furlough in the community, a fact not testified to and not apparent to the Court, Mr. Saravia, according to *Exhibit* 7, spent at least two years, one month in state prison after his sentencing in 1988.

To complete this arithmetic, the Court notes that Mr. Saravia's brief, which was filed on February 20, 1996, counts up his time in state prison after the 1988 conviction as two years, one month and 27 days. The Court refers to page 3 of this brief.

The Court will now turn to a description of the conviction and incarceration for the 1992 offenses, what the Court has referred to above as the "intervening offenses." These offenses are memorialized in *Exhibit* 6 of the record of proceedings here. In this case Mr. Saravia was convicted on a guilty plea on June 30, 1992. His sentencing on the charges to which he pled occurred on July 31, 1992.

In the first instance, Mr. Saravia was convicted for possession for sale of methamphetamine in violation of California Health and Safety Code Section 11378. For this offense he was sentenced to two years imprisonment.

Mr. Saravia was also sentenced at this time for the offense of cultivation of marijuana in violation of California Health and Safety Code Section 11358. For this offense he was sentenced to eight months imprisonment to be served consecutive to the two-year term that the Court has just described.

Mr. Saravia's sentence was enhanced in the year 1992 because of the previous conviction in 1988 as memorialized in *Exhibit* 4 in these proceedings. The enhancement according to the 1992 [criminal /s/ LND] Information, which is also part of *Exhibit* 6, relates to count one of the information; that is, the count ~~for~~ charging possession for sale of methamphetamine in violation of California Health and Safety Code Section 11378.

The term of enhancement that the [California /s/ LND] [S]uperior [C]ourt imposed was three years

imprisonment to be served consecutive to the two years and eight months term that the Court has just described.

Again, as in 1988[,] Mr. Saravia was remanded "forth-with" to the authorities for delivery to the California prison system. His total sentence on the 1992 conviction was six years, four months. The superior court granted him [credit /s/ LND] for time served for 174 days. It appears that the actual time served was 116 days.

Again, Mr. Saravia testified as to his incarceration subsequent to the 1992 conviction. He stated that he had been arrested on April 7, 1992, and had been held continuously until his release from state prison in the month of August, 1995. Therefore, according to Mr. Saravia's testimony, he spent approximately three years, one month in incarceration from the time of sentencing in 1992. At the least he spent three years in incarceration from the time of sentencing. Mr. Saravia also spent three years and four months in incarceration after his arrest. At a minimum he spent three years, three months [in /s/ LND] incarceration after his arrest.

Again, *Exhibit* 7 corroborates to a degree Mr. Saravia's testimony as to the time that he spent in the state prison system. *Exhibit* 7 shows Mr. Saravia's entry into the state prison system on August 13, 1992, and his parole or release from the state prison system on August 4, 1995. Therefore, *Exhibit* 7 shows that he spent at least two years, 11 months

and three weeks in the custody of the state prison system.

Mr. Saravia's brief filed on February 20, 1996, counts up this prison time as two years, 11 months and 20 days. The Court in this respect refers to page 4 of the brief.

Having described the relevant evidence as it relates to the convictions and incarceration, the Court must now analyze what is the effect of this evidence under Section 212(c) of the Act.

The Court must first determine under the last [sentence of /s/ LND] Section 212(c) of the Act whether Mr. Saravia has spent his time in incarceration pursuant to convictions for aggravated felonies. In this respect, no party disputes the characterization of the conspiracy conviction or of the convictions for possession for sale of controlled substances as aggravated felonies as that term is understood under the Act. Under relevant Board of Immigration Appeals precedent, it is quite clear that these types of convictions [d]o, in fact, amount to aggravated felonies as defined in Section 101(a)(43) of the Act.

The parties do dispute whether the offense for cultivation of marijuana under ~~a violation of~~ California Health and Safety Code Section 11358 is or is not an aggravated felony. It is clear that cultivation ~~under~~ [of /s/ LND] marijuana under federal law is a controlled substances felony. In this respect the Court notes that 21 U.S.C. Section 841(a)(1) makes it unlawful to manufacture a controlled substance. In

the federal law the manufacture of a controlled substance includes cultivation of the substance. In this respect the Court refers to 21 U.S.C. Sections 802(a)(15) and 802(a)(22). It is also clear that under federal law it is a felony to "manufacture" [()that is, to cultivate[)] less than 50 marijuana plants. In this respect the Court points to 21 U.S.C. Section 841(a) and Section 841(d [b /s/ LND])(1)(D).

It is also clear that under California law cultivation of marijuana is a felony. The very definition of the offense describes it as a felony. This definition, of course, occurs in California Health and Safety Code Section 11358.

With this background, the parties' point of difference is that the manufacture of a controlled substance, in this case including the cultivation of marijuana plants, requires "mens rea" under the federal law but does not appear to require such "mens rea" under California law. According[ly, /s/ LND] a serious issue has been raised in this case whether the offense of cultivation of marijuana as a violation of California law can be regarded as an aggravated felony under the principles laid out in *Matter of Barrett,* Int. Dec. 3131 (1990); *Matter of Davis,* Int. Dec. 3181 (1992); and *Matter of L-G-,* Int. Dec. 3254 (1995).

Although the Court recognizes that this is a serious issue in this case, the Court must further look into the evidence before it to determine whether, in fact, classification of cultivation of marijuana under

the California criminal law as an aggravated felony makes a ~~different~~ [difference to outcome in the case /s/ LND] or not. In this respect, the Court will turn for a moment to the parties' arguments regarding the calculation of the time of incarceration.

The respondent, Mr. Saravia, first argues that any calculation of time served in this case under ~~a~~ [the /s/ LND] 1988 and 1992 convictions should not include any pretrial detention or presentencing detention. In general, this argument goes to the issue whether credit for time served should be included in Mr. Saravia's sentencing calculations for purposes of the last sentence of Section 212(c).

The Court believes that Mr. Saravia's argument in this respect is defeated by the Board's decision in *Matter of Valdovinos,* 18 I&N Dec. 343 (1982). *Valdovinos* discussed the effect of California Penal Code Section 2900.5 relating to the treatment of credit for time served in calculating incarceration subsequent to convictions. It appears that California Penal Code Section 2900.5 has not changed substantially since the time *Matter of Valdovinos* was decided. Accordingly, the Court must regard *Valdovinos* as conclusive on this issue of credit for time served.

Mr. Saravia has also argued orally that any time spent in observation after the 1988 or 1992 sentencing or any time possibly spent in transfer between county authorities and state prison authorities should not be counted as time spent in imprisonment subsequent to the convictions in question. However, in this

respect the Court notes that the [S]uperior [C]ourt in both 1988 and 1992 did remand Mr. Saravia "forthwith" to the proper authorities for delivery into the state prison system. There is no question in this case that Mr. Saravia was not free after either of those convictions. Accordingly, the Court must regard any time spent in custody after the relevant dates in 1988 or 1992 as time spent in incarceration for purpose of the last sentence of Section 212(c) of the Act.

Mr. Saravia has also argued that in some way the Court should not include the three-year sentence for enhancement in the 1992 conviction. Mr. Saravia has argued that the enhancement is not in itself a conviction. The Court notes that in many cases an enhanced sentence or the enhancement itself cannot be regarded as a conviction independent of other convictions.

However, the Court must also note that while an enhancement ~~is not a conviction or~~ may not be a conviction, there cannot be any dispute that it is, in fact, a sentence. In this respect it appears that the enhancement sentence imposed on Mr. Saravia in 1992 was part of the sentencing for the ~~violation of four~~ [conviction on /s/ LND] count one of the information; that is, it was a sentence for an enhancement of the sentence for the violation of California Health and Safety Code section 11378. Accordingly, a reasonable reading of the 1992 judgment and the information on which that judgment rests is that the total sentence of imprisonment imposed on count one of the

information was a sentence of imprisonment of five years.

The Court notes that the sentence of imprisonment for cultivation of marijuana was consecutive to the sentence of imprisonment on count one. ~~Although~~ [T]he respondent has made some arguments that the sentence or the [service of the /s/ LND] term of incarceration ~~subsquent~~ [pursuant /s/ LND] to the 1992 conviction should be parcelled out or prorated between the [conviction for /s/ LND] cultivation of marijuana ~~conviction~~ and the [conviction for /s/ LND] possession for sale of a controlled substance conviction. [No New ¶ . /s/ LND] The respondent has not provided to the Court any authority for this proposition. Accordingly, it seems to the Court that[,] ~~the respondent given that~~ [because /s/ LND] the [1992 /s/ LND] sentencing was consecutive[,] ~~in 1992~~ [the respondent /s/ LND] first served his sentence in the California prison system on count one of the 1992 information. Accordingly, he did serve the time that the court has referred to, namely a minimum of three years, three months for an aggravated felony.

In sum, therefore, if the Court completes the arithmetic in line with its discussion with this decision, the Court must find that it cannot be disputed that Mr. Saravia has spent more than five years in incarceration on convictions for aggravated felonies~~, or in an aggravated felony on~~. Accordingly, the Court must find that Mr. Saravia is not eligible to apply for relief under Section 212(c) of the Act.

Given that there is no question that Mr. Saravia has been convicted for aggravated felonies, the Court knows of no other form of relief for which he may be eligible.

ORDER

IT IS ORDERED that Victor Saravia-Paguada be deported to Honduras which is his country of citizen[ship /s/ LND] and nationality.

/s/ Lawrence N. Dicostanzo
LAWRENCE N. DICOSTANZO,
Immigration Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VICTOR SARAVIA-PAGUADA, Petitioner, v. ALBERTO R. GONZALES, Attorney General, Respondent.	No. 05-73098 Agency No. A17-266-808 ORDER (Filed Oct. 4, 2007)

Before: GOULD and RAWLINSON, Circuit Judges, and COVELLO,* Senior Judge.

The Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

* The Honorable Alfred V. Covello, Senior United States District Judge for the District of Connecticut, sitting by designation.

PL 101-649, November 29, 1990, 104 Stat 4978

UNITED STATES PUBLIC LAWS
101st Congress – Second Session
Convening January 23, 1990

PL 101-649 (S 358)
November 29, 1990
IMMIGRATION ACT OF 1990

AN ACT to amend the Immigration and Nationality Act to change the level, and preference system for admission, of immigrants to the United States, and to provide for administrative naturalization, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 511. LIMITATION ON WAIVER OF EXCLUSION FOR RETURNING PERMANENT RESIDENTS CONVICTED OF AN AGGRAVATED FELONY.

(a) IN GENERAL. – Section 212(c) (8 U.S.C. 1182(c)) is amended by adding at the end the following: "The first sentence of this subsection shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years."

PL 102-232, December 12, 1991, 105 Stat 1733

UNITED STATES PUBLIC LAWS
102nd Congress – First Session
Convening January 3, 1991

PL 102-232 (HR 3049)
December 12, 1991

MISCELLANEOUS AND TECHNICAL IMMIGRATION AND NATURALIZATION AMENDMENTS OF 1991

AN ACT to amend the Immigration and Nationality Act to restore certain exclusive authority in courts to administer oaths of allegiance for naturalization, to revise provisions relating to O and P nonimmigrants, and to make certain technical corrections relating to the immigration laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 306. CORRECTIONS RELATING TO TITLE V OF THE IMMIGRATION ACT OF 1990.

<< 8USCA § 1182>>

(a)(10) The last sentence of section 212(c) of the INA, as added by section 511(a) of the Immigration Act of 1990, is amended by striking "an aggravated felony and has served" and inserting "one or more aggravated felonies and has served for such felony or felonies".

PL 102-232, December 12, 1991, 105 Stat 1733

UNITED STATES PUBLIC LAWS
102nd Congress – First Session
Convening January 3, 1991

PL 102-232 (HR 3049)
December 12, 1991

MISCELLANEOUS AND TECHNICAL IMMIGRATION AND NATURALIZATION AMENDMENTS OF 1991

AN ACT to amend the Immigration and Nationality Act to restore certain exclusive authority in courts to administer oaths of allegiance for naturalization, to revise provisions relating to O and P nonimmigrants, and to make certain technical corrections relating to the immigration laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 310. EFFECTIVE DATES.

Except as otherwise specifically provided, the amendments made by (and provisions of) –

(1) sections 302 through 308 shall take effect as if included in the enactment of the Immigration Act of 1990,

(2) section 309(a) shall be effective with respect to allotments for fiscal years beginning with fiscal year 1989, and

(3) section 309(c) shall take effect on the date of the enactment of this Act.

8 U.S.C. § 1101

Title 8. Aliens and Nationality
§ 1101. Definitions

(a) As used in this Act –

(43) The term "aggravated felony" means –

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in –

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at [FN4] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at [FN4] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that –

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to

peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in –

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that –

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in *section 7201 of Title 26* (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in *paragraph (1)(A)* or *(2) of section 1324(a)* of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no

other individual) to violate a provision of this chapter *[FN5]*

(O) an offense described in *section 1325(a)* or *1326* of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of *section 1543 of Title 18* or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a

witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

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8 U.S.C. § 1182 (1989). Excludable aliens

(c) Nonapplicability of subsection (a)(1) to (25), (30), and (31)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1)-(25), (30), and (31) of subsection (a) of

this section. Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title.

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8 U.S.C. § 1182 (1991). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than subparagraphs (A), (B), (C), or (E) of paragraph (3)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of an aggravated felony and has served a term of imprisonment of at least 5 years.

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8 U.S.C. § 1182 (1993). Excludable aliens

(c) Nonapplicability of subsection (a)

Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning

to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 1181(b) of this title. The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years.

HEALTH AND SAFETY CODE
DIVISION 10. UNIFORM CONTROLLED SUBSTANCES ACT
CHAPTER 6. Offenses and Penalties
ARTICLE 4. Miscellaneous Offenses and Provisions

Cal Health & Saf Code § **11370.2** (1992)

§ 11370.2. Enhancement of punishment for prior felony convictions related to controlled substances

(a) Any person convicted of a violation of, or of a conspiracy to violate, Section 11351, 11351.5, or 11352 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.

(b) Any person convicted of a violation of, or of a conspiracy to violate, Section 11378.5, 11379.5, 11379.6, 11380.5, or 11383 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.

(c) Any person convicted of a violation of, or of a conspiracy to violate, Section 11378 or 11379 with respect to any substance containing a controlled substance specified in paragraph (1) or (2) of subdivision (d) of Section 11055 shall receive, in addition to any other punishment authorized by law, including Section 667.5 of the Penal Code, a full, separate, and consecutive three-year term for each prior felony conviction of, or for each prior felony Conviction of conspiracy to violate, Section 11351, 11351.5, 11352, 11378, 11378.5, 11379, 11379.5, 11379.6, 11380, 11380.5, or 11383, whether or not the prior conviction resulted in a term of imprisonment.

(d) The enhancements provided for in this section shall be pleaded and proven as provided by law.

(e) The conspiracy enhancements provided for in this section shall not be imposed unless the trier of fact finds that the defendant conspirator was substantially involved in the planning, direction, execution, or financing of the underlying offense.

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(2)

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No. 07-866

In the Supreme Court of the United States

VICTOR SARAVIA-PAGUADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under 8 U.S.C. 1182(c) (1994), the Attorney General lacked the discretion to waive the civil immigration consequences of certain criminal convictions for an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." The question presented is as follows:

Whether, for purposes of 8 U.S.C. 1182(c) (1994), the "term of imprisonment" that an alien served for an aggravated felony includes time that the alien served for the felony by virtue of his status as a repeat offender.

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In the Supreme Court of the United States

No. 07-866

VICTOR SARAVIA-PAGUADA, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-28) is reported at 488 F.3d 1122. The decision of the Board of Immigration Appeals (Pet. App. 30) and the initial decision of the immigration judge (Pet. App. 37-50) are unreported.

JURISDICTION

The court of appeals entered its judgment on May 21, 2007. A petition for rehearing was denied on October 4, 2007 (Pet. App. 51). The petition for a writ of certiorari was filed on December 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1988), the Attorney General was given the discretion to waive the civil immigration consequences of, *inter alia*, certain criminal convictions for lawful permanent residents who had been domiciled in the United States for seven consecutive years. Although that statute, by its terms, gave the Attorney General the discretion only to admit aliens who had temporarily gone abroad, it was construed to apply also to aliens who were already in the country but subject to deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295-296 (2001).

In the Immigration Act of 1990, Congress imposed limits on the ability of the Attorney General to grant waivers under Section 212(c). See Pub. L. No. 101-649, § 511, 104 Stat. 5052. As amended by technical amendments that are concededly applicable here, the relevant provision prohibited the Attorney General from granting a waiver to an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 212(c) (1994). In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether. See Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-597.[1]

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[1] At the same time that it repealed Section 212(c), Congress enacted new Section 240A, 8 U.S.C. 1229b (2000 & Supp. V 2005), which provides for a similar form of discretionary relief known as cancellation of removal. Cancellation of removal, however, is unavailable for *any* alien who has been convicted of an aggravated felony, without any discrete requirement concerning the term of imprisonment that the alien served for that felony. See 8 U.S.C. 1229b(a)(3).

2. Petitioner is a Honduran national who entered the United States as a lawful permanent resident in 1966. In 1988, petitioner was convicted of, *inter alia*, conspiracy to sell methamphetamine and cocaine, possession of cocaine for sale, and possession of methamphetamine for sale, all in violation of California law. He was sentenced to a total of 68 months for those offenses (to be served consecutively), and actually served a total of 38 months. The Immigration and Naturalization Service then commenced deportation proceedings against him; petitioner conceded that he was deportable, but sought discretionary relief under Section 212(c). In 1992, while deportation proceedings were ongoing, petitioner was convicted of possession of methamphetamine for sale and cultivation of marijuana, again in violation of California law. He was sentenced to a total of 76 months for those offenses (to be served consecutively); that sentence included a 36-month recidivist enhancement, based on his prior California drug convictions. See Cal. Health & Safety Code § 11370.2 (West 2007). Petitioner actually served a total of 39 months. Pet. App. 3-4, 37-45; Pet. 8-9.

After petitioner was again released from prison, the deportation proceedings against him resumed. In 1996, an immigration judge ordered petitioner's deportation. Pet. App. 37-50. In his oral decision, the judge held that petitioner was ineligible for a waiver under the applicable version of Section 212(c) because he "ha[d] spent more than five years in incarceration on convictions for aggravated felonies." *Id.* at 49. As is relevant here, the judge rejected petitioner's contention that, in applying Section 212(c), the judge "should not include the three-year sentence * * * enhancement in the 1992 conviction." *Id.* at 48. The judge explained that the enhance-

ment was part of the sentence for the offense of selling methamphetamine and that the "total sentence" for that offense included the enhancement. *Id.* at 48-49.

3. After subsequent proceedings on issues not relevant here, the Board of Immigration Appeals affirmed the immigration judge's initial decision in a summary order. Pet. App. 30. Petitioner then filed a petition for review in the Ninth Circuit, which was dismissed for lack of jurisdiction. *Id.* at 7. Petitioner was thereafter ordered to surrender for deportation. *Ibid.*

4. In 2004, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The district court denied the petition. See *Saravia-Paguada* v. *Ridge*, No. C 04-03940 JSW, 2005 WL 88967 (Jan. 13, 2005). Like the immigration judge, the district court rejected petitioner's contention that, for purposes of Section 212(c), the "term of imprisonment" that he served for his prior felonies excluded time that he served by virtue of his status as a repeat offender. *Id.* at *5. The court reasoned that, "[u]nder the plain language of the statute, there is no requirement that the time served must be for only convictions of substantive criminal offenses," and added that "[p]etitioner has not presented any authority supporting his argument that the time he served under a sentence enhancement may not be considered in determining whether [p]etitioner served a term of at least five years in prison" for purposes of Section 212(c). *Ibid.*

While petitioner's motion to amend the judgment was pending, Congress passed the REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302, which required that all then-pending habeas petitions challenging removal be transferred to the relevant courts of appeals

and treated as petitions for review. See *id.* § 106(c), 119 Stat. 311. Pursuant to that provision, the district court transferred the case to the Ninth Circuit. Pet. App. 7.

5. Treating petitioner's habeas petition as a petition for review, the court of appeals denied the petition. Pet. App. 1-28.

The court of appeals rejected petitioner's contention that, for purposes of Section 212(c), the "term of imprisonment" excluded time that he served by virtue of his status as a repeat offender. Pet. App. 7-15. Specifically, the court rejected petitioner's reliance on its earlier decisions in *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc); *Rusz* v. *Ashcroft*, 376 F.3d 1182 (9th Cir. 2004); and *United States* v. *Rodriquez*, 464 F.3d 1072 (9th Cir. 2006), cert. granted, No. 06-1646 (argued Jan. 15, 2008). Pet. App. 8-11. The court explained that, under the statutes in those cases, the issue was "whether or not [an individual had] committed certain past crimes * * *, the *nature* of which might give rise to adverse consequences attaching to a present conviction"—and, the court reasoned, it was therefore appropriate to exclude recidivism enhancements in computing the potential maximum term of imprisonment for a prior offense under those statutes. *Id.* at 10-11. By contrast, under Section 212(c), "[t]he focus * * * is on calculating the *amount* of time served *on account* of the felony convictions, which is an inquiry not related to the nature of the offense under [a] categorical approach." *Id.* at 11.

The court of appeals stated that "[t]he question here is straightforward: whether [p]etitioner 'served for such felony or felonies a term of imprisonment of at least 5 years.'" Pet. App. 11 (quoting 8 U.S.C. 1182(c) (1994)). The court agreed with the immigration judge that "the

enhancement is not separable from the sentence"; instead, "the enhancement is, by definition, an additional term of imprisonment added to the base term, which is imposed because of some aggravating circumstance such as recidivism." *Id.* at 12 (internal quotation marks and citation omitted). "Because the terms of the statute require a court only to determine the ultimate amount of time served," the court of appeals continued, "it is immaterial whether a sentencing enhancement may have increased the base term." *Ibid.*

The court of appeals added that "[p]etitioner's interpretation * * * creates practical difficulties Congress cannot have intended." Pet. App. 12-13. The court explained that "[a] requirement to prorate the 'time served' based on any conceivable aggravating factors a sentencing judge might apply would be unworkable[,] because the [immigration judge] would be forced to contrive proportionate values for each aggravating factor, then deduct those artificial values from the imposed sentence." *Id.* at 13. The court concluded that "such an unwieldy approach" would be "contrary to [Section 212(c)'s] plain meaning." *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the inclusion of the phrase "for such felony or felonies" in the technical amendments to Section 212(c) "exhibited an intent that the time served be calculated without regard to sentencing enhancements." Pet. App. 13. The court explained that the purpose of that amendment was simply to "clarify that the bar [to Section 212(c) relief] applied to multiple aggravated felons"—*i.e.*, individuals who had committed multiple aggravated felonies—"whose *aggregate* terms of imprison-

ment exceeded five years." *Ibid.* (emphasis added; citation omitted).[2]

ARGUMENT

Petitioner renews his contention (Pet. 13-29) that, for purposes of the bar to discretionary relief in the applicable version of former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994), the "term of imprisonment" that he served for his prior felonies excluded time that he served by virtue of his status as a repeat offender. The court of appeals' decision does not conflict with any decision of this Court or of another court of appeals, and further review is unwarranted.

1. The court of appeals correctly held that, for purposes of Section 212(c), the "term of imprisonment" for an alien's prior aggravated felonies includes time served by virtue of the alien's status as a repeat offender. Under the relevant version of that provision, the Attorney General was prohibited from granting a waiver to an alien "who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years." 8 U.S.C. 1182(c) (1994). That language directs the Attorney General to consider all of the time that the alien actually served "for [an aggravated] felony or felonies." Contrary to petitioner's repeated contentions (Pet. 13-16, 23-24), when a jurisdiction subjects repeat offenders to an enhanced penalty, that penalty is no less a penalty "for" the underlying offense than the lower penalty applicable to first-time offenders; the recidivist penalty merely

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[2] The court of appeals also rejected petitioner's contention that it would be impermissibly retroactive to apply the post-1990 bar on discretionary review in his case. Pet. App. 15-28. That holding is not challenged in the petition.

constitutes a "stiffened penalty for the latest crime." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948).[3]

As the court of appeals noted (Pet. App. 12-13), moreover, petitioner's interpretation of Section 212(c) would be difficult to apply in many cases, because Section 212(c) indisputably focuses on the term of imprisonment that an alien actually *served* for his aggravated felony (or felonies), not the term of imprisonment to which the alien was initially *sentenced*. Where the former term is shorter than the latter, it would not be immediately obvious how much of the time that the alien actually served was attributable to his status as a repeat offender. Indeed, this case presents that very difficulty: while petitioner was sentenced to a total of 76 months for his 1992 drug offenses (including a 36-month recidivist enhancement), he actually served a total of only 39 months. As the court of appeals observed (*ibid.*), it is difficult to imagine that Congress intended that, in determining the relevant "term of imprisonment" for purposes of Section 212(c), the Attorney General should prorate the time that the alien actually served in order to discount for time attributable to the alien's status as a repeat offender. See *id.* at 8 n.6 (explaining petitioner's proposal that "47% of [his actual sentence] should be prorated").

2. Petitioner cites no case in which any court has adopted his interpretation of Section 212(c). And even

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[3] Petitioner contends (Pet. 15) that, in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), this Court held that "recidivism does not relate to the commission of the offense." *Id.* at 488. *Apprendi*, however, stands only for the propositions that, as a matter of *constitutional* law, recidivism need not be treated as an offense element—and a jurisdiction may therefore choose to treat recidivism as a sentencing enhancement that a court can take into account without submission to the jury. See *ibid.*

if petitioner had identified a circuit conflict concerning the correct interpretation of that provision, such a conflict would not merit this Court's review, because the interpretation of that provision is of limited prospective importance. In 1996, Congress repealed Section 212(c) altogether, and replaced it with new Section 240A, 8 U.S.C. 1229b (2000 & Supp. V 2005), which provides for cancellation of removal—a narrower form of discretionary relief that is unavailable for *any* alien who has been convicted of an aggravated felony (without any discrete requirement concerning the term of imprisonment that the alien served for that felony). See p. 2 & note 1, *supra*. The question presented in this case is therefore even potentially relevant only to those aliens who, like petitioner, have been convicted of an aggravated felony but retain the ability to invoke the Attorney General's authority to grant discretionary review during the time period from 1990 (when the bar was originally enacted) to 1996 (when Section 212(c) was ultimately repealed). See *St. Cyr*, 533 U.S. at 314-326. For that additional reason, further review is unwarranted.

3. Petitioner contends (Pet. 6, 27-29) that "substantively the same issue" is currently pending before this Court in *United States* v. *Rodriquez*, No. 06-1646 (argued Jan. 15, 2008). In *Rodriquez*, the Court is considering whether a state drug-trafficking offense has a "maximum term of imprisonment of ten years or more," and therefore qualifies as a predicate offense for purposes of the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e) (2000 & Supp. IV 2004), when the defendant was a repeat offender and the maximum term of imprisonment for the offense was ten years for such offenders. As the court of appeals noted in distinguishing its decision in *Rodriquez* (and its earlier deci-

sions involving other statutes on which petitioner relies),[4] the statute at issue in *Rodriquez* looks to the *potential* maximum term of imprisonment for a defendant's prior offense, not to the *actual* term of imprisonment that the defendant served. See Pet. App. 8-11. Thus, even if the Court were to hold in *Rodriquez* that, for purposes of the ACCA, the relevant "maximum term of imprisonment" for an offense is the maximum term to which first-time offenders were subject (even for repeat offenders), it would not follow that petitioner is entitled to relief, because the term that he actually served plainly included time served by virtue of his status as a repeat offender. To the extent that the Court concludes that the question presented in this case is similar to the question presented in *Rodriquez*, however, the Court may deem it appropriate to hold the petition pending its decision in that case.

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[4] To the extent that petitioner contends (Pet. 5 n.2, 17-27) that the court of appeals' decision in this case conflicts with those earlier decisions, such a conflict would not justify further review even if it existed, because this Court does not sit to resolve intracircuit conflicts. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending the Court's decision in *United States* v. *Rodriquez*, No. 06-1646, and then disposed of accordingly.

Respectfully submitted.

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In The

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VICTOR SARAVIA-PAGUADA,

Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

This Court should grant Petitioner's petition for writ of certiorari to resolve the important issue of whether the time served pursuant to a recidivist sentencing enhancement statute can constitute time served *for* an aggravated felony conviction. In Petitioner's case, this issue arises in the context of analyzing whether the bar to relief from deportation under former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c) (known as "§ 212(c) relief") for aliens who have served over five years in prison[1] applies to Petitioner, given that the time he served pursuant to the sentences he received for his separate aggravated felony convictions totaled less than five years.

The parties do not dispute that Petitioner's incarceration time only exceeds five years if the time served pursuant to the separate recidivist enhancement statute is included in the calculation. The parties also do not dispute that the California recidivist enhancement statute under which Petitioner received an additional three-year sentence in 1992 is a separate offense and does not constitute an aggravated felony. Nonetheless, Respondent argues to this Court that the Court of Appeals committed no error

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[1] This bar was enacted by the Immigration Act of 1990 ("IMMACT"), Pub. L. No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

in holding that Petitioner's three-year enhancement was *for* an aggravated felony conviction.

Petitioner urges this Court to grant certiorari to rule on the important question of the interplay between recidivism statutes and the underlying offenses, and to clearly set forth that recidivism statutes are separate from the underlying offense and that a sentence under an enhancement statute is *not* a sentence for the underlying offense. This Court is currently considering a similar sentencing enhancement issue in the criminal context in *United States v. Rodriquez*, Case Number 06-1646, and should grant the instant petition in order to apply that same analysis in the immigration context.

ARGUMENT

1. Respondent erroneously argues that the "term of imprisonment" that Petitioner served for his status as a recidivist should be included in calculating the total time he has served *for* his aggravated felony convictions. However, that argument is squarely at odds with the plain language of the statute, as well as with the Court of Appeals' own precedent.

Respondent attempts to argue that a sentence under a recidivist enhancement statute is effectively the same as a sentence under a substantive criminal statute. However, on their face, the California state statutory provisions at issue rebut that argument. In 1992, Petitioner was convicted of two substantive

offenses: possession of methamphetamine, in violation of California Health & Safety Code § 11378, and cultivation of marijuana, in violation of California Health & Safety Code § 11358. A conviction under each of these statutes carried a sentencing range of sixteen months, two years, or three years,[2] presumably to allow the sentencing judge to consider the particular factors present in the case in order to determine whether to sentence at high, medium, or low points along that range. Petitioner does not dispute that any amount of time served for his convictions under these statutory provisions would constitute time served *for* aggravated felony convictions.

In addition to the sentences he received as a result of his convictions under the aforementioned conduct-based statutes, Petitioner was also sentenced under California Health & Safety Code § 11370.2, which imposes a separate three-year sentence based on one's *status* as having previously been convicted of an enumerated drug-related crime. As the California state courts have themselves explicitly recognized, such a status-based penalty is entirely distinct from any penalty imposed under the three-tiered sentencing range that the California legislature provided for convictions for the substantive offenses at issue here. *See, e.g., People v. Gokey*, 73 Cal. Rptr. 2d 134, 136 (1998) ("[California Health and Safety Code] section

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[2] Petitioner received the mid-range sentence of two years for the Section 11378 violation and a consecutive sentence of eight months for the Section 11358 violation.

11370.2 ... impose[s] additional punishment for the *status* of the offender, and *not the acts or omissions underlying the current offense.*") (emphasis added); *People v. Walker*, 29 Cal. 4th 577, 582 (2002) ("[R]ecidivist enhancements ... are attributable to the defendant's status as a repeat offender ... [S]uch enhancements are not attributable to the underlying criminal conduct which gave rise to the defendant's prior and current convictions....") (internal quotations and citations omitted). *See also Rusz v. Ashcroft*, 376 F.3d 1182, 1185 (9th Cir. 2004) ("When analyzing a conviction's maximum possible sentence ... we must separate the recidivist enhancement from the underlying offense, because sentence enhancements ... do not describe substantive criminal offenses.") (internal quotations and citations omitted); *United States v. Moreno-Hernandez*, 419 F.3d 906 (9th Cir. 2005) (under the federal sentencing guidelines, status-based sentencing enhancements cannot be considered in determining the maximum possible sentence for an offense so as to determine whether that offense constitutes a "crime of violence.").

In light of the fact that the substantive statutes at issue provide for a sentencing range to account for the presence or absence of aggravating factors, and in light of the entirely separate status-based sentence imposed under the recidivist statute, it is clear that a distinction must be drawn between penalties for substantive offenses (aggravated felonies) and penalties for status-based offenses (like the recidivism statute at issue here, which all parties agree does not

itself constitute an aggravated felony). Thus, time served pursuant to a recidivist enhancement statute does not constitute time served *for* aggravated felony convictions.[3]

2. In addition, Respondent errs in arguing that it would be difficult to apply Petitioner's analysis in cases where an alien is sentenced to more time in prison than she or he actually serves. In fact, it is not at all difficult as it is merely a matter of calculating what percentage of the alien's sentence was issued under a recidivist enhancement statute, and what amount was issued under a statute describing a substantive, conduct-based offense. For example, if a person received a total six-year sentence that was an aggregate of a three-year sentence for a drug-trafficking conviction (an aggravated felony) and a three-year sentence for a recidivist enhancement (not an aggravated felony), one-half (50%) of the time in prison that the person served would be the time actually served *for* the aggravated felony conviction for purposes of determining whether the IMMACT bar applies.

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[3] Respondent finds no support in his citation to *Gryger v. Burke*, 334 U.S. 728 (1948), in which this Court held, *inter alia*, that imposing a life sentence under the Pennsylvania Habitual Criminal Act was not impermissibly retroactive (because one of the qualifying convictions predated the act's enactment) and did not subject the petition to double jeopardy. This constitutional inquiry is not at all on point to the instant case, which concerns solely the *nature* of the statutes of conviction, and the time served pursuant to those statutes.

Likewise, in Petitioner's case, the record of conviction clearly shows that he was sentenced to a total of 76 months in prison for his 1992 convictions, with 40 of those months having been imposed for his two aggravated felony drug convictions, and 36 of those months having been imposed for a non-aggravated felony (the recidivist enhancement). Because the recidivist enhancement does not describe a substantive offense,[4] the total time that Petitioner served in prison for his aggravated felony convictions should have been prorated and reduced by 47 percent, such that of the 39 months that he served, only 18.3 months could have been properly considered to constitute time served *for* aggravated convictions for purposes of determining whether the IMMACT bar applied to his case. Thus, contrary to Respondent's argument, this is a straight-forward calculation that was well within Congress' intent in specifying that time served in prison may trigger the IMMACT bar *only if* it was time served *for* one or more aggravated felony convictions.

3. Moreover, Petitioner's interpretation of section 212(c) is clearly supported by the Ninth Circuit's own prior decisions in *Toia v. Fasano*, 334

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[4] *See, e.g., United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc) (because a recidivist enhancement does not describe a substantive offense, courts must *only* "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements" in calculating the sentence for an aggravated felony).

F.3d 917 (9th Cir. 2003) and *Samaniego-Meraz v. INS*, 53 F.3d 254 (9th Cir. 1995), *overr'd in part by Toia v. Fasano*, 334 F.3d 917 (9th Cir. 2003), as well as by the Sixth Circuit's decision in *Campos v. INS*, 16 F.3d 118 (6th Cir. 1994) and the Board of Immigration Appeals' ("BIA") decision and *Matter of A-A-*, 20 I. & N. Dec. 492 (BIA 1992).

In *Matter of A-A-*, the BIA considered whether the IMMACT bar applies to time served for convictions that occurred prior to the Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, 102 Stat. 4181 (enacted Nov. 18, 1988), for crimes that were only later classified as aggravated felonies by the ADAA. 20 I. & N. Dec. at 502. In conducting the relevant inquiry, the BIA first determined that the underlying conviction for which the alien had served his prison sentence constituted an aggravated felony. *Id.* at 500. Only upon answering that question affirmatively did the BIA proceed to the second part of its inquiry, and determined that the alien had served at least five years in prison *for* that qualifying aggravated felony conviction and was, therefore, statutorily ineligible to apply for § 212(c) relief. *Id.* at 502-03.

Similarly, in *Campos v. INS*, the Sixth Circuit conducted essentially the same analysis to determine whether an alien who was convicted of a controlled substance offense prior to IMMACT, for which he served nearly six years in prison, was subject to the IMMACT bar and rendered ineligible to apply for § 212(c) relief. 16 F.3d at 120-21. The court first determined that the statute under which the alien was

convicted described an aggravated felony offense, and then confirmed that the alien served over five years in prison *for* that aggravated felony conviction. *Id.* ("Mr. Campos' crime clearly falls within this definition of an aggravated felony, and it is undisputed that he served five years and more for the crime.").

Likewise, the Ninth Circuit has also applied that same analysis in determining whether the IMMACT bar rendered an alien statutorily ineligible for § 212(c) relief. In *Samaniego-Meraz v. INS*, the court held that an alien was statutorily barred from § 212(c) relief under IMMACT because: (1) the alien had been convicted of controlled substance offenses, which constituted aggravated felonies; (2) he served seven years in prison *for* those aggravated felony convictions; and (3) it was not impermissibly retroactive to apply IMMACT's amendments to § 212(c) to his pre-IMMACT convictions. 53 F.3d at 255-57. Subsequently, in *Toia v. Fasano*, the Ninth Circuit considered whether, pursuant to this Court's § 212(c) retroactivity analysis in *INS v. St. Cyr*, 533 U.S. 289 (2001), it would be impermissibly retroactive to apply the IMMACT bar to aliens who were convicted by guilty plea prior to the law's enactment. 334 F.3d at 918-19. Again, the court determined that the statute under which the alien was convicted described an aggravated felony under 8 U.S.C. § 1101(a)(43), and that the time he served in prison was *for* that aggravated felony conviction. *Id.* at 918. The court then held that, because under *St. Cyr* it would be impermissibly retroactive to apply the IMMACT bar to an

alien who pled guilty to an aggravated felony prior to the law's enactment, the alien was statutorily eligible to apply for § 212(c) relief. *Id.* at 919-20.

As the above cases make clear, the Ninth Circuit, its sister circuits, and the BIA are all in accord that in order to determine whether the IMMACT bar renders a particular alien ineligible to apply for § 212(c) relief, the following factors must be considered: (1) whether the underlying statute of conviction describes an aggravated felony offense; and, if so, (2) whether the alien served at least five years in prison *for* that aggravated felony conviction. However, in Petitioner's case, the court failed to engage in the proper inquiry. Rather, it appears, it implicitly – and erroneously – found the first step unnecessary, and wrongly concluded that, under the second step, there was no need to distinguish between aggravated felonies and non-aggravated felonies for purposes of the IMMACT bar analysis. This decision has created a conflict among the circuits as to how to conduct a § 212(c) analysis under IMMACT, and is also in conflict with the Ninth Circuit's (as well as the BIA's) own clear precedent on this issue.

Moreover, the Ninth Circuit's decision is contrary to the plain language of the statute as Congress specified that an alien would be barred from relief only if he served five years or more in prison *for* one or more aggravated felony convictions. 8 U.S.C. § 1182(c) (1992). Since it is undisputed that the California recidivism statute does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43), the court's decision

was clearly contrary to the plain language of the statute and must be reversed. Review by this Court is thus warranted, both to resolve these conflicts and to correct the lower court's failure to follow clear Congressional intent.

4. Furthermore, the aforementioned conflict among the circuits and within the Ninth Circuit merits this Court's review because this issue has an extremely far-reaching effect. Contrary to Respondent's argument, this issue is relevant to all aliens who were convicted *at any time* prior to April 1, 1997, *including before 1990*, by jury trial. This is true because this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001), and the Ninth Circuit's application of that analysis to pre-IMMACT convictions, extends *only* to convictions attained by plea agreement for which aliens required (and were otherwise eligible for) § 212(c) relief.[5]

5. Finally, as discussed in the petition at 27-29, the question presented in *United States v. Rodriquez*, Case Number 06-1646 (argued Jan. 15, 2008) is substantially similar to the question presented in the instant case and will provide this Court the opportunity

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[5] In *INS v. St. Cyr*, 533 U.S. at 326, this Court held it was impermissibly retroactive to apply the repeal of § 212(c) to aliens who had entered into plea agreements prior to the repeal's enactment. Applying *St. Cyr*, the Ninth Circuit held in *Toia v. Fasano*, 334 F.3d at 919-20, that it would be impermissibly retroactive to apply IMMACT's 212(c) bar to persons who entered into plea agreements prior to IMMACT's enactment.

to apply its holding in *Rodriquez* to the immigration context.

In *Rodriquez*, the Ninth Circuit held that a conviction for a substantive drug-related offense which carried a maximum five-year sentence could not be a predicate drug offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (which required a ten-year sentence), even where the sentence for the underlying conviction was coupled with an additional five-year recidivist enhancement. As should have been the conclusion in the instant case, in *Rodriquez*, the determinative factor for the lower court in deciding whether additional consequences should attach to the conviction was the length of the sentence *only for the substantive offense*, not including any recidivist sentencing enhancements. *United States v. Rodriquez*, 464 F.3d 1072, 1081-82 (9th Cir. 2006). In *Rodriquez*, as in the court's precedent decisions in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc) and *Rusz v. Ashcroft*, 376 F.3d 1182 (9th Cir. 2004), discussed at length in the petition at 17-24, the court never considered any elements of the crime or the "nature" of the crime itself, instead focusing solely on the *length of sentence* that could be imposed *for* the qualifying conviction, which determined whether adverse consequences attached to that conviction. Likewise, in Petitioner's case, the relevant inquiry should only have been the *length of sentence* that was served *for* the aggravated felony conviction, not time served

pursuant to the additional three-year sentence received under the separate recidivism statute.

Although Respondent attempts to distinguish Petitioner's case from *Rodriquez* because *Rodriquez* concerned the *potential* maximum term of imprisonment for aggravated felonies, whereas the instant inquiry concerns the *actual* time served for aggravated felonies, that distinction is of no relevance. Whether considering the potential or actual terms of imprisonment, the only material question is whether a status-based recidivist enhancement statute describes a substantive offense (here, an aggravated felony) for purposes of determining whether time served under that statute is time served *for* a substantive offense (again, here, an aggravated felony). Whether the time could be served or has already been served is of no import – the relevant inquiry is the *nature* of the sentencing statute in both *Rodriquez* as here. Thus, this Court should find that the issue presented in *Rodriquez* is substantially similar to that presented in the instant case, such that review is warranted in Petitioner's case as well.[6] In the alternative and at a

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[6] Respondent also erroneously relies on this Court's decision in *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam) to argue that this Court should deny the petition. However, in *Wisniewski*, this Court held that, although it generally does not resolve intracircuit conflicts, an exception is where "the pendency of another case before this Court [raises] the same issue, when certification may be advisable in the proper administration and expedition of judicial business." *Id.* at

(Continued on following page)

minimum, the Court should hold this petition in abeyance and, after issuing its decision in *Rodriquez*, either request further briefing of the parties to address the effect of *Rodriquez* on the instant petition, or remand the case to the Court of Appeals for a new consideration of the matter in light of *Rodriquez*.

CONCLUSION

For all the foregoing reasons, and for those presented in the petition, the petition for writ of certiorari should be granted or held pending *Rodriquez* and considered in light of the Court's determination in that case.

Respectfully submitted,

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902. Here, the pendency of this Court's consideration of *Rodriquez* supports granting the instant petition.